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051 ✓
No. 15664

United States
Court of Appeals
for the Ninth Circuit

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTI-
QUE,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 15 1957

PAUL P. GIBSON, CLERK

No. 15664

United States
Court of Appeals
for the Ninth Circuit

WALTER HERBERT MACARTNEY,

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland 4, Oregon,
For Appellee.

THE HISTORY OF THE CITY OF BOSTON

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME
BY NATHANIEL BENTLEY
IN TWO VOLUMES
VOL. I.

BOSTON: PUBLISHED BY J. B. ALLEN, 1825.
NEW-YORK: J. B. ALLEN, 1825.
LONDON: J. B. ALLEN, 1825.
PHILADELPHIA: J. B. ALLEN, 1825.
BALTIMORE: J. B. ALLEN, 1825.
PHILADELPHIA: J. B. ALLEN, 1825.

In the District Court of the United States
for the District of Oregon

Civil No. 8512

WALTER HERBERT MACARTNEY,

Plaintiff,

vs.

COMPAGNIE GENERALE TRANS-ATLAN-
TIQUE, a Corporation,

Defendant.

PRETRIAL ORDER

As the result of pretrial conference heretofore had, whereat the plaintiff was represented by John F. Conway and the defendant was represented by Lofton L. Tatum of Wood, Matthiessen, Wood and Tatum, its attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. Defendant was and now is a foreign corporation existing under the laws of the Republic of France; it had and now has a Pacific Coast agent and maintains a regular sailing schedule of its vessels to and from the port of Portland, Oregon.

2. That at all material times this plaintiff was and now is a citizen of the United States and lived and resided in and still has his residence and domicile in Portland, Oregon, and this controversy involves a cause for more than \$3,000.00 damages.

3. That at all times hereinafter mentioned the M/S Wyoming was and is a French motor ship, in the possession of and owned, operated and employed by defendant corporation in maritime commerce, as a passenger and merchant vessel between points in Europe and points in the United States of America.

4. That on or about October 10, 1954, the defendant had a stevedoring contract with the Oregon Stevedoring Company, an Oregon corporation, to act as stevedores for defendant's vessels, including the M/S Wyoming at Portland, Oregon.

5. That on or about and prior to October 10, 1954, plaintiff was regularly employed by said Oregon Stevedoring Company as a longshoreman to assist in unloading cargo on said vessel as aforesaid at Portland, Oregon, and at the time of the occurrences hereinafter mentioned, the plaintiff was engaged in the performance of his regular duties and in the course of his regular employment with said Oregon Stevedoring Company, working on board such vessel and in connection with unloading such cargo, while said vessel was moored and docked on navigable waters.

6. That in the afternoon of October 10, 1954, plaintiff was working in No. 4 hold of said vessel in connection with unloading cargo consisting of heavy crates of glass which were moved on a certain hand operated, 4-wheeled dolly, which had been furnished by and were being used by said Oregon Stevedoring Company and its employees.

7. That at all material times there was and now is in full force and effect, a Pacific Coast Marine Safety Code, which was agreed to and adopted under the provisions of the Pacific Coast longshore agreement.

8. Plaintiff has elected to pursue a remedy against defendant pursuant to the Longshoremen and Harbor Worker's Compensation Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation at Seattle, Washington, a notice of his election to sue.

Plaintiff's Contentions

1. That on or about October 10, 1954, at about 2:30 o'clock p.m., while said vessel was so moored and docked at Portland, Oregon, and in the course of his employment, this plaintiff was required to be in and work in No. 4 hatch of such vessel, and was required to use a certain hand operated, four-wheel dolly or hand truck, in performing and doing his regular duties and work in connection with assisting in such cargo unloading operation. That such dolly or hand truck was supplied and furnished by said Oregon Stevedoring Company, Inc., for use in and to be used in connection with such cargo unloading operation, and it was used by plaintiff and other longshoremen to move heavy pieces of plate glass in a crate, weighing approximately 1,500 pounds or more, from one place to another on said vessel.

2. That no other means or methods were provided for plaintiff and the other longshoremen he was assisting to perform their work in connection with such cargo unloading operation.

3. That the defendant owners or charterers of such vessel, or their said agents, then and there so carelessly and negligently maintained and operated the said vessel and dolly or hand truck in an unseaworthy and defective condition in that said hand truck was improperly constructed and top heavy, or defendant negligently caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, heel over, and while so doing and having so done, defendant negligently failed to warn this plaintiff in time or at all that such vessel was about to and did lurch, careen, tilt, slant, lean, heel over so that when this plaintiff was standing near to such hand truck, with his back toward such truck, and while it was loaded with a large heavy piece or pieces of plate glass in a crate, weighing approximately 1,500 pounds, that said hand truck suddenly and without any warning tipped over and thereupon violently precipitated said heavy crate of plate glass downward and onto both legs of plaintiff from behind, and plaintiff then and there received the grave and serious injuries hereinafter alleged.

4. Plaintiff contends that certain provisions of said safety code were applicable to the accident complained of in this case, to wit:

Section II, Rule 201. The owners and/or operators of vessels shall provide safe ship's gear and equipment and a safe working place for all stevedoring operations on board ship.

Section II, Rule 205. The safety duties of the supervisory personnel, walking boss, ship and dock foremen, and assistant ship and dock foremen, are:

(a) To see that all working conditions are safe and that the gear is in apparent safe working condition during the operation.

(c) To see that operations are carried on in a safe manner.

(d) Where conditions warrant and he is not in immediate touch with his superintendent or other employer's representative, to stop work if necessary to avoid accidents.

5. That said accident was caused without any contributory fault or neglect on the part of plaintiff, and solely and proximately by the defective, unsafe and unseaworthy condition of said vessel and by the failure of defendant to provide proper and sufficient ways, works, means and appliances on said vessel and by the fault and negligence of the defendant, acting by and through its agents, officers, or representatives, in the following, among other particulars:

(a) In allowing to remain and continuing to use a dangerous and unsafe and unseaworthy dolly or hand truck, as part of the regular gear, appli-

ances and equipment used on said vessel when said defendant and its agents knew, or in the exercise of ordinary care should have known, that allowing such dolly or hand truck so to be used in such condition created a grave and imminent hazard to persons using same and working near said truck, and particularly this plaintiff;

(b) In failing to inspect and discover the said hazardous and dangerous dolly or hand truck;

(c) In that the defendant, through its master or agents of the said steamship improperly directed this plaintiff to work in an unreasonable, defective, unsafe and dangerous place where he was exposed to extreme danger of being struck by the fall of such a large heavy crate of plate glass, which did fall as herein described;

(d) That said vessel was unseaworthy by reason of using said improperly constructed and top heavy, defective, and unsafe dolly or hand truck, in connection with such cargo unloading operation.

(e) In failing to warn plaintiff of the defective, unsafe and unseaworthy condition of said dolly or hand truck.

(f) In negligently causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, heel over, and while so doing and having so done, defendant negligently failed to warn this plaintiff in time or at all that such vessel was about

to and did lurch, careen, tilt, slant, lean, heel over and such ship did thereby become unsafe and unseaworthy under the existing circumstances, causing said dolly to tip over and precipitate such crate of glass upon plaintiff, when defendant knew that plaintiff was working under such conditions.

(g) Defendant failed to provide adequate and safe ship's gear, appliances and equipment, and a safe working place for all stevedoring operations on board said ship, including more particularly, the operation whereby plaintiff was injured.

(h) Defendant failed to see that all working conditions were safe, and that the gear and appliances used were in apparent safe working condition during the operation complained of herein.

(i) Defendant failed to stop said work and operation in order to avoid an accident and injury to plaintiff.

6. That as a direct and proximate result of the said unseaworthiness of said vessel and of its ways, works, means and appliances, and said negligence of the defendant and the aforesaid violations of said Pacific Coast Marine Safety Code this plaintiff was violently struck by said large, heavy crate of glass as aforesaid and precipitated downward onto a part of the hold of said vessel and plaintiff thereby received and sustained a severe tearing, twisting and wrenching of the bones, tendons, muscles and ligaments and severe crushing, mashing, bruises and

contusions to both of his legs, and also received compound fractures of both of his tibias and fibulas, and general shock, some of which injuries are of a permanent nature, and all of which injuries have caused plaintiff great mental and physical pain and disability, and also required plaintiff to have and be placed in a large heavy cast on both of his legs for a long time.

7. That by reason of all said injuries plaintiff has suffered general damages in the sum of \$85,000.00.

8. That plaintiff, by reason of said injuries will always be disabled to a substantial degree from engaging in his regular or any gainful occupation, and will always have limitation of motion and of the use of his legs and body, and has lost wages in the sum of \$22.50 per day, making a total of \$8,000.00 to the time of trial. That as long as plaintiff is unable to return to his regular or any occupation, he will continue to lose the sum of \$22.50 per day, which sum he claims as his special damages herein.

That prior to and at the time of said accident, plaintiff was a strong, healthy, able-bodied man, 45 years of age, with a life expectancy of 24.54 years.

9. That as a further result of said injuries plaintiff has been compelled to incur expenses in securing medical care and treatment, and was required to undergo a major surgical operation on each of his legs, and be hospitalized for a long time, and he will in the future continue to incur large expenses for

medical care and treatment, and that by reason thereof plaintiff has been further especially damaged in the sum of not less than \$1,989.40.

Defendant's Contentions

1. Denies the contentions of plaintiff.

2. The dolly or hand truck being used by plaintiff and his fellow longshoremen was supplied to said longshoremen by Oregon Stevedoring Company, Inc., plaintiff's employer. Said dolly or hand truck was of the same general type as has been supplied by stevedoring companies for use by their employees in the port of Portland, Oregon, for many years prior to plaintiff's alleged injury.

3. Said dolly or hand truck was not owned or supplied to plaintiff by defendant.

4. If said dolly or hand truck was defective in any manner as alleged by plaintiff, the responsibility therefor rests solely upon the plaintiff's employer, Oregon Stevedoring Company, Inc., and not upon defendant.

5. Plaintiff's injury was caused wholly or in part by his own negligence in leaving the crate of glass unattended upon the dolly, in standing in front of a loaded dolly, in failing to keep a lookout and in failing to act as an ordinarily careful and prudent longshoreman.

6. Plaintiff's injury was caused wholly by the negligence of plaintiff's employer in furnishing an allegedly unsafe dolly or hand truck, in failing to

inspect said dolly or hand truck, in improperly and inadequately supervising plaintiff's work and place of work, in failing to warn plaintiff of the allegedly unsafe dolly or hand truck, in failing to provide safe and adequate gear, appliances and equipment and a safe working place for plaintiff, in failing to see that all working conditions were safe and that the gear and appliances used were in apparent safe working condition, and in failing to stop said work and operation in order to avoid an accident and injury to plaintiff.

7. Plaintiff's injury was caused wholly or in part by the negligence of his fellow longshoremen in failing to attend the crate of glass upon the dolly, and in bringing a loaded dolly into position when there were other operations being conducted.

8. Plaintiff denies the contentions of defendant.

Plaintiff's Exhibits

1. Pacific Coast Longshore Agreement
2. Pacific Coast Marine Safety Code
3. Photographs
4. X-Rays
5. Medical Reports
6. Income Tax Returns
7. Hospital records regarding plaintiff.

Defendant's Exhibits

21. Deposition of plaintiff
22. Photostats of deck log
23. Photostats of cargo plan

24. Deposition of Chief Mate Canoen

25. Supercargo reports

26. Depositions of longshoremen

Lundstrom

Fantz

Roberson

Christiansen

Foster

Sofich

Raanes

De Francisco

Thomas

Walker

27. Sketch

The exhibits heretofore referred to have been identified and received as pretrial exhibits, the parties agreeing with the approval of the Court that no further identification of exhibits is necessary, and in the event that said exhibits or any thereof should be offered in evidence at the time of trial, such exhibits are subject only to the objections of relevancy, competency and materiality.

All of the parties reserve the right to call expert witnesses.

This order represents the result of pretrial conferences held between the parties, their attorneys and the Judge presiding in open court.

It Is Hereby Ordered that the foregoing constitutes the Pretrial Order in the above-entitled cause and supersedes the pleadings in the within cause,

but may be amended after signature or during trial only upon agreement of the parties, or by order of this Court to prevent manifest injustice.

Dated and signed in open Court this 23rd day of April, 1957.

/s/ GUS J. SOLOMON,
United States District Judge;

/s/ JOHN F. CONWAY,
Of Attorneys for Plaintiff;

/s/ LOFTON L. TATUM,
Of Attorneys for Defendant.

Lodged: January 1, 28, 1957.

[Endorsed]: Filed April 24, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8512

WALTER HERBERT MACARTNEY,

Plaintiff,

vs.

COMPAGNIE GENERALE TRANS-ATLAN-
TIQUE, a Corporation,

Defendant.

JUDGMENT ORDER

This cause came on for trial before the Honorable Gus J. Solomon, Judge of the above-entitled Court,

and a jury duly impaneled and sworn on the 23rd day of April, 1957, the plaintiff appearing in person and by John F. Conway, his attorney, and the defendant appearing by one of its attorneys, Lofton L. Tatum. Whereupon, opening statements of counsel were made and testimony taken on behalf of each party and thereafter the cause was argued by the counsel to the jury and the Court instructed the jury as to the law and the jury retired in charge of a properly sworn officer to consider interrogatories submitted to it and its verdict and thereafter said jury returned into the Court the following interrogatories:

“[Title of District Court and Cause.]

“INTERROGATORIES

“We, the jury, answer the special interrogatories submitted to us as follows:

“1. Was the dolly unseaworthy or unsafe?

“A. No.

“2. Was the M/S Wyoming caused to lurch, careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time?

“A. No.

“Dated this 24 day of April, 1957.

“HERMAN J. FOELLER,

“Foreman.”

and the following verdict:

“[Title of District Court and Cause.]

“VERDICT

“We, the jury, being first duly sworn and impanelled to try the above-entitled cause, do hereby find our verdict in favor of the defendant.

“Dated at Portland, Oregon, this 24 day of April, 1957.

“HERMAN J. FOELLER,
“Foreman.”

which interrogatories and verdict were received by the Court and ordered filed.

Therefore, upon motion of the defendant for judgment upon said verdict,

It Is Adjudged that judgment upon the issues of this case be entered in favor of the defendant, that the plaintiff's complaint be dismissed and that defendant have and recover from said plaintiff Walter H. Macartney its costs and disbursements herein taxed in the sum of \$107.90 and that execution issue therefor.

Dated this 24th day of April, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed April 29, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Compagnie Generale Trans-Altantique, a corporation, defendant, and to Wood, Matthiessen, Wood and Tatum and Lofton L. Tatum, your attorneys of record.

You, and each of you, are hereby notified that the above-named plaintiff, Walter Herbert Macartney, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on or about April 24, 1957.

This appeal is taken on both questions of law and fact.

/s/ JOHN F. CONWAY,
Attorney for Plaintiff-Appellant.

Receipt of Service acknowledged May 21, 1957.

[Endorsed]: Filed May 22, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED
INSTRUCTIONS

Comes now the plaintiff and respectfully requests the Court to give the following instructions to the jury:

* * *

VIII.

If you find on the instructions given to you, from a preponderance of satisfactory evidence, that Mr.

Macartney, the plaintiff, is entitled to a verdict at your hands, and will award to him such an amount of money as will adequately compensate him for his injuries and damages, bearing in mind that the burden is on the plaintiff to establish by a preponderance of satisfactory evidence the nature and extent of his injuries and damages.

In awarding damages, if any, you will take into consideration the nature and extent of his injuries, and which of such injuries are temporary or permanent in character, his pain and suffering endured, and which he will endure in the future, if any, as a proximate result of the accident; his mental anguish, if any, any future loss of earnings he will sustain resulting from this accident, and then allow plaintiff whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and within the confines of my instructions, not exceeding \$85,000.00, the amount demanded by plaintiff in this case as general damages.

In connection with this subject of damages you may also allow Mr. Macartney certain additional or special damages, if any, for reasonable expenditures incurred for medical and surgical care, hospitalization, for cost of X-Rays, and loss of earnings, as a longshoreman, if any, that Mr. Macartney sustained up to the time this case was tried, and then allow him whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and not exceeding the sum of \$9,963.40 claimed by Mr. Macartney as special damages in this case.

United States District Court,
District of Oregon

No. Civil 8512

WALTER HERBERT MACARTNEY,

Plaintiff,

vs.

COMPAGNIE GENERALE TRANS-ATLAN-
TIQUE, a Corporation,

Defendant.

April 23, 1957—10:00 A.M.

Before: Honorable Gus J. Solomon, District Judge,
with a jury.

Appearances:

JOHN F. CONWAY,
Attorney for Plaintiff.

LOFTON L. TATUM,
Of Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY AND PRO-
CEEDINGS ON TRIAL OF ABOVE-EN-
TITLED CAUSE

* * *

HENRY L. FOSTER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

Q. Where do you reside, Mr. Foster?

A. You will have to talk pretty loud. I don't hear very good.

Q. Is it hard for you to hear me?

A. Yes, I don't hear very good.

Mr. Conway: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Conway): How old a gentleman are you? A. 58.

Q. Are you married? A. Yes.

Q. How long have you been working as long-shoreman in Portland? A. 38 years.

Q. Have you worked in all departments?

A. I have.

Q. Where were you working on October 10, 1954, on the day Mr. Macartney was hurt?

A. I worked on the same ship.

Q. That was the Wyoming? [4*]

A. Wyoming.

Q. What was your job at that time?

A. I was on the other side from him.

Q. You were on the inshore side?

A. Yes, on the inshore side.

(Testimony of Henry L. Foster.)

Q. He was on the offshore side?

A. Yes, sir.

Q. How far away were you working from Mr. Macartney, approximately?

A. About, approximately 20 feet.

Q. How many cases of—or crates of glass had this gang taken out that day before Mr. Macartney was hurt?

A. Oh, several of them.

Q. How was the ship moored at the dock?

A. Oh, it was tied with ropes, lines.

Q. How many lines?

A. It had a couple of head lines, a spring line forward and aft.

Q. Do you remember which dock?

A. Terminal No. 1.

Q. How was this glass cargo stowed in this hatch?

A. Well, some of it was stowed in the wing. Some of it was stowed thwartship, and some of it was stowed fore and aft in the midship.

Q. Explain to the jury what you mean by what you just said? [5]

A. Well, that fore and aft is fore and aft, the ship length, and thwartship would be crossways. The glass would be sitting crossways.

Q. Was the bow of the ship upstream or downstream?

A. Upstream.

Q. Upstream. Was this glass cargo stowed between decks?

A. It was, and in the shelter deck, yes, the second deck.

(Testimony of Henry L. Foster.)

Q. Second deck.

A. From the boat deck down the first.

Q. Did you see Mr. Macartney just before the accident happened? A. I did.

Q. What was he doing when you saw him immediately before the accident?

A. Well, I tell you, what he was doing, there was a small crate of glass. It was about possibly six inches thick and 12 or 14 feet long and about 9 feet high, and the glass was standing there, and, naturally, a small piece of glass, tall like that, you got to steady it to keep it from falling over.

Q. Where was this glass?

A. Sitting on blocks.

Q. That was out——

A. Out in the hatch a little bit. It was about four feet from the coaming on two blocks, and Macartney was steadying that glass for the sling to come in to take it out. [6]

Q. And the sling came in from overhead, did it, Mr. Foster? A. Yes, come in from overhead.

Q. That was located on a boom, was it?

A. Yes, two booms.

Q. Two booms.

A. One short-arm, a midship boom. One of them could have been pretty straight. The other one is pretty flat.

Q. Explain to the jury what you mean now.

A. Well, the cargo in the square of the hatch, it's just like this (indicating), and your boom, you lower it to the work.

(Testimony of Henry L. Foster.)

Q. Tell them what a boom is, Mr. Foster.

A. Well, a boom is, well, a boom is a loading arm.

Q. What is it made out of?

A. Of the ship, and it has got a block on the end for the wires to go through for the cables to go through your hooks onto the other boom. Then you got your preventers on there and your safety guys on there to keep it from swinging back and forth and down.

Q. Then how are the cables operated?

A. The cables are operated by winch, two winches, double winches.

Q. What kind of power do they have?

A. Well, some of them is electric, some of them —on this one I think it was electric. I am sure. [7]

Q. Then you say Mr. Macartney was standing by this case of glass that was out in the square of the hatch a little bit?

A. He was, yes.

Q. Was he——

A. He was steadying the glass.

Q. Steadying.

A. A case of glass, a piece of glass that small, you know, it would tip over easy.

Q. How was he facing?

A. He was facing the hatch. He was on the off-shore side with that, for the, the sling was on the yardarm, and it would come in to the midship, and, naturally, he would be watching the dock for the sling.

Q. Would he be facing the dock, Mr. Foster?

(Testimony of Henry L. Foster.)

A. He would.

Q. The dock would be inshore?

A. Yes, sir.

Q. How far away from him were you standing when you saw him doing this?

A. Oh, I was not over 15 feet.

Q. While Mr. Macartney was waiting for the hook, the sling to come in, what did you see take place?

A. Well, I just seen the movement, a flash, and somebody hollered, and I went over there, and the glass was on him. [8]

Q. Which glass are you talking about now, Mr. Foster?

A. Well, they got a dolly. I could draw a picture of it easier.

Q. I will show you this one that Counsel has (presenting sketch to the witness). Mr. Foster, take this pointer and show the ladies and gentlemen where you were. This sketch here, Mr. Foster, represents a diagram that we were talking about at the time we took the depositions in this case some months ago. Do you remember?

A. No, but this diagram is the flat part of the dolly. You haven't got no diagram of the dolly the way the glass was sitting on it.

Q. That is right.

A. There is no diagram there at all.

Q. That is right; but will you explain what you are talking about?

A. You see, this is the bottom part of the dolly.

(Testimony of Henry L. Foster.)

Well, the dolly was sitting this way. It would be a small angle. It would be a small angle like that (indicating). The glass, short glass, would be laying against the dolly against the framework, and you have not got a picture here.

Q. Here is a picture, Mr. Foster. Tell the folks what you mean.

A. All right; here is the framework here, and the dolly is about this tall, and it has not got much lean to it for a [9] short piece of glass.

Well, if you get too short a piece of glass, it don't cut so much weight as a heavy piece of glass where it hangs over so much, and this was a short piece, four feet, and it was on this dolly, and that gives the dolly a tendency to tip from the boom. When the glass, heavy glass, comes on the end of a boom it made the ship list.

Mr. Tatum: I object to that, your Honor.

The Witness: It turned the glass off the dolly.

The Court: I did not hear what he said. I couldn't hear.

Mr. Tatum: He said that if the piece of glass was at the end of the boom it would cause the ship to list.

The Court: If the piece of glass was at the end of the boom it would cause the ship to list?

The Witness: Do you understand what I mean? You see, you have got a boom.

Mr. Tatum: Wait a minute, Mr. Foster.

The Court: I think that the testimony is objectionable on many grounds, including the fact

(Testimony of Henry L. Foster.)

that he is expressing an opinion when there are no qualifications of his ability to express the opinion. The jury is instructed to disregard the statement. I think that this is probably a good time to take our noon recess. We will recess until 2:00 o'clock this afternoon. You are excused until that time. [10] Please remember my admonition. Do not make up your mind as to how this case is to be decided until you have heard all the evidence, the argument of counsel and the instructions of the Court.

(Noon recess taken). [11]

Afternoon Session—2:00 P.M.

(At 2:00 p.m. on April 23, 1957, the trial herein was resumed as follows:)

HENRY L. FOSTER

resumed the stand as a witness in behalf of Plaintiff herein and was further examined and testified as follows:

Direct Examination

(Continued)

By Mr. Conway:

Q. While Mr. Macartney was waiting for the hook and sling to come down into the hatch, what did you see take place?

A. Well, he was hanging onto a piece of glass. He went over, and somebody hollered, and we went over there and picked the glass up.

(Testimony of Henry L. Foster.)

Q. Which way was Mr. Macartney facing when you looked at him? A. Facing the dock.

Q. Facing the dock?

A. Yes, kind of across-ship.

Q. What was it that fell upon him?

A. Well, it was a piece of glass about 10 to 12 inches wide and about 8 to 10 feet long.

Q. How high?

A. Well, about 4 feet. [12]

Q. What was the glass in?

A. In a case, a wooden case.

Q. A wooden case? A. Yes.

Q. How much did it weigh, approximately, the case?

A. Oh, somewhere between 1,500 and 2,000.

Q. Pounds? A. Yes.

Q. What part of the case fell upon what part of Mr. Macartney?

A. Well, the top went over and caught him in the back of the legs about halfway between his knee and the foot and fell on top of him, and he had both feet then under the case.

Q. Both feet underneath it?

A. Both feet underneath it.

Q. Then what did you do when that happened?

A. Well, we picked the case up. There was eight of us in the hold picked it up. All of us lifted on the case and got it up, and when he fell backwards on top of the case like this, his feet were underneath it, and when we got his feet clear I caught

(Testimony of Henry L. Foster.)

him in my arms and packed him over and put him on a board sling to take him on the dock.

Q. You say you packed him in your arms?

A. Yes.

Q. Explain to the ladies and gentlemen here and the Court [13] what you mean by the board sling.

A. Well, a board sling is a lift sling. It is four inches high, and it has got a lip on the corner to put the board underneath there, and it has got a plug here to stop it off and two spreaders come up on the side to make one bundle for to send the board sling on the dock.

Q. How large is that board you are talking about?

A. Oh, it's about six feet long, four feet wide.

Q. You say you took him to that board?

A. Yes.

Q. Then what did you do?

A. We took him, two of us rode the board to the dock and took him onto the pier and waited for the ambulance to come, and we noticed the gear was—the ship was getting light. All the cargo was out of the bottom, and you could see the booms working the ship.

Mr. Tatum: If your Honor please, I think it is not responsive to the question.

The Court: The answer is not responsive.

Mr. Conway: I will connect it up, your Honor.

Q. What did you do when you got outside on the dock there, Mr. Foster, with respect to watching

(Testimony of Henry L. Foster.)

the ship immediately after you got out there? Did you look at it? A. Yes, we did.

Q. What did you see? [14]

* * *

A. As we was on the dock waiting for the ambulance to come, the walking boss come down the dock.

Q. What was his name?

A. Harry Hangland. He was standing there. He is the big shot for Oregon Stevedore, and he come down the dock, and we watched the short-arm boom, and it moved. You could see it move from the weight of the glass on the short-arm.

Q. Were they taking glass out of the hold at that time?

A. Yes, taking glass out of several hatches.

Q. What did you tell Mr. Hangland, the walking boss? A. I told him it would——

The Court: Wait a minute.

Mr. Tatum: I object to that, your Honor, as hearsay. Mr. Hangland is not our employee.

The Court: That is his own employer. This is not a case against his own employer. I do not understand what he said anyway. He said that he watched it from the dock and he saw the boom moving up and down; is that right?

The Witness: That is right. You understand, Judge, what a boom is?

The Court: Oh, yes; I know what a boom is, but I do not understand what the significance of the testimony is that the boom was moving up and down.

(Testimony of Henry L. Foster.)

The Witness: Well, it would be the rolling of the ship which caused the boom to go up and [16] down.

Mr. Conway: Well, that is what the Judge wants to know. What did the ship do?

The Witness: Well, the ship rolled. That is what caused the boom, when a ship rolls, like your body.

Q. (By Mr. Conway): Which way did it roll?

A. Rolled down and up.

Q. Did it roll towards the dock?

A. Your body, see, and your arm is like a yard. Well, it came like that. The whole ship has got to move, ain't it?

Q. Which way did it move?

A. It moved down with the glass when it was on the short-arm. It come down, and it would go up, and the glass landed on the pier.

Q. How much did it make the ship list when it did not——

A. Well, I don't know that.

Mr. Tatum: Just a minute, your Honor.

The Court: Just a minute.

Mr. Tatum: I object to that as a leading question. The movement of a ship in the water is not a list, and the question of degree I think is a matter of expert opinion, and I do not think this witness can estimate how many degrees the ship listed.

The Court: Perhaps he can. Are you in a position to estimate the amount of list?

The Witness: No, I couldn't tell, on the end of [17] a 90-foot boom, you see, I can't tell that.

(Testimony of Henry L. Foster.)

The Court: You cannot tell?

The Witness: No.

The Court: Go ahead.

Q. (By Mr. Conway): Put it this way, Mr. Foster. Was it a small amount of list or a larger amount? A. Well, quite a lot.

Mr. Tatum: If the Court please, that is objected to. That is conjecture.

Mr. Conway: Wait a minute until he gets a chance to object. When you see him stand up, don't say anything because he wants to object.

The Court: I am going to let him testify. It is not clear, but I think you may bring it out on cross-examination. Go ahead.

The Witness: Well, you take on the end of a 90-foot boom sticking out 90 feet, and when the ship lists it will move the boom quite a bit on the end.

The Court: Are you talking about a roll; not a list?

The Witness: A roll, yes. Well, it will cause it to list. It is clanky.

The Court: All right, the witness meant roll and not list.

Mr. Tatum: Then I move that it be stricken because it is not within the issues of this case. [18]

* * *

Q. (By Mr. Conway): By the way, Mr. Foster, I forgot to ask you, this picture of this dolly, Exhibit 3-B, that is the one that you talked about before on your deposition; do you remember?

(Testimony of Henry L. Foster.)

A. That is right.

Q. Is that the same type of dolly that you were using that day? A. It looks the same.

Q. Who furnished the dolly, what stevedoring company? A. Oregon Stevedore.

Q. Oregon Stevedoring. All right; that was the same stevedoring company that you and Mr. Macartney were working for that day?

A. That is right.

Q. What is that particular dolly made of, Mr. Foster?

A. Well, it is made of aluminum pipes and light metal.

Q. Does it have any wheels on it?

A. Yes, it has four wheels on it.

Q. Whereabouts?

A. On the bottom part of it. The dolly tips this way and then slats under that, little prongs on the bottom there. I don't think—this has got a plate. There was a plate [19] under the dolly, a little, small bit of iron that goes there.

Q. You mean you are talking about those little wings on the corner?

A. Yes, when it fell on Macartney it never come to the top of this dolly.

Q. You mean the case of glass? A. Yes.

Q. It didn't come to it, to the top, about two-thirds of the way up?

A. Yes, about two-thirds of the way up, maybe a little bit more.

Q. Did that case that fell off the dolly that fell

(Testimony of Henry L. Foster.)

on Macartney, did it stick over each end of the dolly? A. It did.

Q. About how much?

A. Oh, a couple feet.

Q. Then you say it was how thick, Mr. Foster?

A. About 10, 12 inches. I never measured it.

Q. And it was made of wood?

A. That is right.

Q. What was the floor of this hatch made of where they were loading this glass?

A. Well, it was a steel deck, and then the hatch covers was wood.

Q. How many men did it take to lift this case of glass off [20] of Mr. Macartney?

A. Well, there was eight of us lifting on it.

* * *

Q. (By Mr. Conway): Did you work in the other hold before you worked in this hold that day?

A. Yes, we did. We discharged.

Q. What did you unload? A. Steel. [21]

Q. Steel? A. Plate steel.

Q. Do you remember what hold it was?

A. I think it was No. 2.

Q. When you got through unloading steel from that hold, was the hold empty or full?

A. Empty.

Q. Can you tell the Judge and jury what a tender ship is?

The Court: A what?

Mr. Conway: A tender ship.

(Testimony of Henry L. Foster.)

A. Well, it is cranky.

Q. What do you mean?

A. Well, it rocks easy, rolls. A ship that is loaded, when it is loaded with a heavy load on the boom, it rolls.

Q. Was that the kind of a ship that this was that afternoon?

A. It was.

Q. What?

A. It was, yes.

Q. From your own best recollection can you tell what caused this plate of glass to fall off of the dolly?

Mr. Tatum: If your Honor please, that is a question to be answered by the jury.

The Court: Yes; objection sustained.

Q. (By Mr. Conway): How did you pick up Mr. Macartney after the case of glass was lifted off of him? [22]

A. Well, when—he fell backwards on the piece of glass with his foot underneath on the back like that (indicating) and his knees buckled and laid right on the glass when he had his knees over the edge of the glass as it come up. Then I went around and packed him in my arms and carried him over on the board.

Q. Before this accident happened that day, Mr. Foster, while you yourself were unloading glass cargo on the other side of the ship from where Mr. Macartney was, did you notice any list to the ship?

A. Yes, it had an inshore list because——

Q. How did you happen to notice that?

A. Well, we noticed their glass over the other

(Testimony of Henry L. Foster.)

side, they didn't have to push on that like we did and wheel it up there to the hatch coaming.

Q. Well, explain what you mean by that to the jury.

A. Well, you could tell by the way the guys was pushing on their glass theirs was coming downhill, and ours was going uphill.

Q. In other words, the glass that you were moving from the inshore side of the ship to the hatch, you were pushing that uphill; is that right?

A. Yes.

Q. What kind of a deck was it?

A. Steel deck. [23]

Q. Steel deck. You were using the same type of dolly in this picture?

A. That is right.

Q. Then you noticed that was the condition on the offshore side. It was sloping toward the inshore side of the hatch; is that right?

A. It was.

Q. What did you notice about Mr. Macartney when you took the case of glass off of him?

A. Well, when I picked him up in my arms the bones was sticking out of his legs about that much (indicating).

Q. When you say "that much," how much do you mean?

A. Well, about two inches, something like that.

Q. Which leg?

A. Both of them.

Q. Was there any bleeding of his leg?

A. No, we looked when I got him on the board, and I pulled up his pants legs to see whether he was bleeding or not. You know, a guy can bleed

(Testimony of Henry L. Foster.)

pretty easy with the bones sticking out of his leg, but it was punctured through the skin so tight that there was no bleeding.

Q. Was he complaining of any pain?

A. Yes; when I was carrying him over, Tom placed his hand under his feet—George, I mean George, and he said, “Take it easy with me.” [24]

Q. When you got out on the dock like you stated a little bit ago, how long were you out there with Mr. Macartney before the ambulance came to take him to the hospital?

A. Well, I really don’t know. It was quite a few minutes.

Q. While you were there on that occasion did you look from time to time at the ship to see what the ship was doing?

A. We did, and talked about it. The walking boss and I talked about it.

Q. While you were doing that, did that condition of the ship happen more than once?

A. It did every load of glass.

Mr. Tatum: If your Honor please, what condition? I think it is an indefinite question, that the condition continued to exist—what condition?

Q. (By Mr. Conway): I am talking about, Mr. Foster, the condition you noticed of the ship rolling back and forth. How many times did you notice that while you were watching for the ambulance to come?

A. Well, every time—the gears was all working practically together, and every time they would bring a load of glass out until they dropped them,

(Testimony of Henry L. Foster.)

then it would straighten and back up again (indicating).

Q. By that do you mean several times?

A. Several times, yes.

The Court: I did not understand that. Is it [25] your testimony that every time the boom picked up a load that the ship rolled?

The Witness: That is right.

The Court: The ship rolled with the loading?

The Witness: Yes, coming over to the dock side, you see, when they would pick it up from midship and take it over on the yard, when they would get the heavy glass on the yard it would rock, roll.

Q. (By Mr. Conway): You mean over the dock, Mr. Foster?

A. Yes, over the dock because it was not in midship because you were picking right straight up in the midship.

Q. Mr. Foster, the kind of crate that was on this particular dolly on that occasion that fell on Mr. Macartney, is that particular type of crate harder or easier to take off a dolly than a taller crate would be?

A. Well, it's a lot easier——

Mr. Tatum: If your Honor please——

Mr. Conway: Just a minute.

Mr. Tatum: I object to that as indefinite, vague, the question, harder or easier.

The Court: Objection overruled. You may answer the question.

(Testimony of Henry L. Foster.)

Mr. Conway: The Judge said you can answer the question.

The Witness: Well, it stands to reason a taller piece has got more lean than a shorter. [26]

Q. You mean on the dolly?

A. Yes, just like taking a load on a two-wheel truck, if you get heavy stuff on the bottom you got to pull harder to get it over. If you got a taller piece and it leans against your truck, it is easier to bring it.

The Court: To what specification of negligence does this question refer?

Mr. Conway: About the dolly tipping over.

The Court: You are talking about the size of the glass.

Mr. Conway: The size of the crate of glass that was on the dolly I asked him about, your Honor; they seem to have a variance.

The Court: Do you complain about the size of the load?

Mr. Conway: No, it is the way some of the crates, your Honor, affect the dolly. Some of them—I am trying to make it clear by this witness' testimony to the effect that a low, flat crate would tip off easier than a higher when—that was the purpose of the question, from the dolly.

The Court: Very well.

Mr. Conway: There was nothing wrong with the crate of glass itself, your Honor.

Q. Have you ever had any occasion, Mr. Foster,

(Testimony of Henry L. Foster.)

to know about any of these cases of glass falling off from the dollies before this happened?

A. Yes. [27]

Q. How long was this particular dolly standing there with this case of glass on it before the case fell over onto Mr. Macartney?

A. Oh, five or ten minutes.

Q. You do not know for sure how long it was?

A. No.

Q. It would be more or less? A. No.

Q. Was Mr. Macartney working on this particular operation of taking out glass the same as he had done that day before on other crates of glass that he and his partner moved out from the hatch?

A. Yes.

Q. I mean the method of his operation.

A. That is right.

Q. Just explain to the Court and jury how Mr. Macartney's partner would move out the glass from the place it stood on the deck in the ship out to the hatch.

Mr. Tatum: Excuse me; is that how he would or how he did?

Mr. Conway: How he did.

The Witness: Well, he would take the dolly and take it over to the piece of glass, tip the dolly up, and then push it under and then drag the whole glass, dolly and all, and the heavier piece of glass, a taller piece of glass would lean back [28] against the dolly harder than a shorter piece of glass.

(Testimony of Henry L. Foster.)

Q. All right, then, what did they do? What did they do after they got it on the dolly?

A. They wheeled it out to the hatch.

Q. Which way was it? Tell us.

A. Stand it up—that would be fore and aft, and they stand it up on blocks so they put a sling on it.

Q. When they got the dolly out to the square of the hatch, Mr. Foster, how would they stand it with respect to the dock?

A. It would be fore and aft of the ship, and it would be fore and aft of the dock so the sling would go on each end of it.

Q. In other words, it would be parallel with the dock? A. Yes.

Q. Is that the usual and customary way of doing this unloading operation? A. It is.

Q. You say you have done that yourself for many years? A. That is right.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Mr. Foster, is this about like what the hatch was at the time Mr. Macartney was hurt? [29]

A. Well, I will take a look.

(Witness examines sketch.)

Q. These red marks here are supposed to indicate a crate of glass? A. That is right.

Q. And the label "Dolly" is supposed to represent the dolly? A. Yes.

(Testimony of Henry L. Foster.)

Q. This is the square of the hatch?

A. Yes.

Q. This is forward and this is aft?

A. Right.

Q. This is the starboard side where the dock is, and this is the port side? A. That is right.

Q. Is that roughly the condition at the time?

A. Yes, that is about it.

Q. Were you standing over here where the——

A. There was a section of hatches on the aft, rear end.

Q. What do you mean, section of hatch?

A. Well, beams from that over there.

Q. Wasn't the hatch completely covered?

A. No, this is the deck above it here, and this glass was sitting on a deck below. Well, there was one set of hatches on this hatch (indicating).

Q. On the main deck? [30] A. Yes.

Q. On the shelter deck where you were working, this was all covered, wasn't it?

A. Yes, it was covered.

Q. The hatchboards were all in?

A. Where the glass was; that is right.

Q. Where were you standing, over here where these X's are?

A. Right in there (indicating).

Mr. Tatum: If your Honor please, could we open the depositions of all the longshoremen?

The Court: Open the depositions. Have you got a copy?

(Testimony of Henry L. Foster.)

Mr. Conway: It is all right to use a copy, your Honor.

Mr. Tatum: I will go to another subject and come back to this, if I may, your Honor. I drew this sketch according to what I thought the testimony was on the little sketch that we used at the time of the depositions, and that is attached to the original, and I had Mr. Foster down here (indicating); not up in here (indicating). That is the point I wanted to——

The Court: Go ahead. In the meantime we should be able to find the original depositions.

Q. (By Mr. Tatum): Mr. Foster, how big was this load that was on the blocks?

A. Well, it was a pretty high piece. I don't know. It was probably, oh, probably 10 or 12 feet long; about 9 feet [31] high. It was a tall load of glass.

Q. It was sitting on some blocks, was it not?

A. Yes, two blocks.

Q. So it was pretty high. You could hardly reach the top? A. It was; that is right.

Q. You were standing across the way?

A. That is right.

Q. How could you see what Mr. Macartney was doing?

A. Well, because we was at the corner of the hatch where we could see him standing there hanging on the piece of glass.

Q. You were——

(Testimony of Henry L. Foster.)

A. Let me show you something, Bub; you are all mixed up.

Mr. Tatum: I am the first to admit that, Mr. Foster.

A. Macartney was standing right there at this corner steadying that piece of glass, and this one was behind him, and he poked his head right out from the corner right here on this end.

Q. You have Mr. Macartney about here where I have an "R"; is that right?

A. That's right where he was.

Q. Not down here where this "X" was?

A. He was standing here, not where the "X" was. He was standing here on this end of the glass. He was standing right there (indicating). He was steadying that piece of glass.

Q. Was he standing up on the square of the hatch? [32]

A. On the square of the hatch when it fell over on him.

The Court: The original deposition ought to be marked for identification what number?

Mr. Tatum: Exhibit 26.

(Deposition referred to was marked Exhibit 26 for Identification.)

The Court: I think, Mr. Tatum, it might be desirable to remove the sketch from the depositions, and we will give it a different number.

(Thereupon, the sketch referred to was removed from the deposition and marked Defendant's Exhibit 26-A for Identification.)

(Testimony of Henry L. Foster.)

The Court: Give it to the witness.

(Document presented to the witness.)

Q. (By Mr. Tatum): This sketch marked Exhibit 26-A, Mr. Foster, at the top of it it has "Fwd." —forward? A. Yes.

Q. At the bottom it is "Aft," aft?

A. Yes.

Q. Over here on the lower right-hand side is an "X" marked "Walker." A. Yes.

Q. Is that where you were standing, Mr. Foster?

A. No, I was standing right up here (indicating). [33]

Q. You were standing up a little bit forward?

A. Yes, forward, right there, forward end of the glass there (indicating).

Q. Mr. Macartney was over here on the other side?

A. Yes, in there Macartney was (indicating), and this glass behind him right in there, you see, right the corner.

Q. Right where it says "Macartney"?

A. Yes, I was standing right across there (indicating).

Q. How long were you out on the dock after Mr. Macartney was hurt?

A. Oh, I don't know, I don't remember just exactly; not too long and quite a little while, too.

Q. Did any glass come out of the Hatch No. 4, while you were out on the dock? A. It did.

Q. Who was working that?

(Testimony of Henry L. Foster.)

A. Well, the boys down in the hold that worked with them.

Q. How many men came out of the hold to take care of Mr. Macartney? A. Two.

Q. You and who else?

A. Well, one guy rode the board out, and he went back on the ship, and I don't remember who it was. Then George Walker come out and went to the hospital with him after that, and they worked that glass. [34]

Q. As soon as you got Mr. Macartney out on the dock, the gang then started working on the glass again; is that right? A. They did.

Q. Didn't even wait for the ambulance to come?

A. Oh, they waited awhile for the ambulance to come, sure, but other gears was working the glass.

Q. Let's confine ourselves to No. 4, would you?

A. Okeh.

Q. Until the ambulance came, did you take any glass out of No. 4 between the time he was hurt and the time the ambulance came?

A. I don't remember whether they did or not, but I think they did.

Q. You think they did in No. 4. Now, first of all, how many hatches did the Wyoming have?

A. Well, five hatches on it.

Q. It is a five-hatch ship, you think?

A. Yes.

Q. How many of those hatches had glass in them?

(Testimony of Henry L. Foster.)

A. Well, there was the two forward had glass, I know, besides 4.

Q. Were they then working in No. 1 and No. 2?

A. Well, they was working No. 2, but I don't know about No. 1, whether it was 3, what it was—working two gears forward anyhow. [35]

Q. Well, were they working while you were on that dock? A. That they were.

Q. Were they unloading glass?

A. They were.

Q. So it must have been out of Hatches 1 and 2 or 3, two of those hatches?

A. Yes, two of the hatches.

Q. Was anybody working in the after hatch besides your gang?

A. No, it was empty; the after hatch was empty.

Q. No. 5? A. Yes.

Q. Are you sure there was not a No. 6 on this ship?

A. I don't remember whether it was 5 or 6. I don't think there was a 6.

Q. How many gangs were down there working the ship that afternoon?

A. Well, I don't know how many was there.

Q. How many gangs does it take to work a hold?

A. It takes, if you are a loading-out gang, it takes six men in the hold; and if you are discharging gang, it's eight men.

Q. But it is one gang to a hatch?

A. Yes, one gang to a hatch. If you got double gears, sometimes it is two gangs in a hatch. [36]

(Testimony of Henry L. Foster.)

Q. How many gangs were down there that afternoon that Mr. Macartney was hurt?

A. Well, I don't know how many there was forward. I think there was three gangs.

Q. Forward?

A. Three gangs altogether.

Q. Altogether?

A. I think so. I ain't sure. There might have been more.

Q. How long have you been longshoring, Mr. Foster? A. 38 years.

Q. You know most of the fellows who are working in the waterfront, don't you?

A. That's right.

Q. Could you tell me who the gang bosses were at the other hatches that day?

A. God, no, I couldn't tell you because every ship that you work on might work with different—

Q. Well, then, it might also be true that they were not unloading glass anywhere else, mightn't it?

A. They were unloading glass. I could see the glass from the pier. I know that.

Q. I thought you said you saw them bringing it out while you were there? A. I was.

Q. From Hatch Nos. 1 and 2 or 3? [37]

A. Yes, you could see it from the dock when I was on the pier.

Q. And were all of the gear, it was working simultaneously? In other words, the gear at Nos. 1 and 2 was lifting up and carying over and dropping down at the same time; is that right?

(Testimony of Henry L. Foster.)

A. Oh, not right exactly the same time. They don't time each other on a ship, the winch drivers don't, to take out a load. Sometimes they do, sometimes they don't.

Q. They take out a load when it is ready to come out, don't they?

A. That's right; that's right.

Q. It is very rare that all three of them would come out at the same time; isn't it?

A. Yes. It is possible.

Q. It is possible?

A. Sure, some gangs works a little faster than others.

Q. While you were down in the hold there with Mr. Macartney when he was hurt, you couldn't feel the ship list when he was hurt, could you?

A. You can't hardly feel it when you are working.

Q. So you didn't feel any movement at all just before he was hurt?

A. When you are in the hold of a ship, no.

Q. When you were out on the dock and you looked at the booms [38] that you say were moving as cargo was being worked, you couldn't guess how much they moved, could you?

A. No, you couldn't guess how much they moved.

Q. These dollies that you used that day are the same kind of dollies you have been using for many years, aren't they?

A. That is right.

Q. No different?

A. No, I guess they ain't.

(Testimony of Henry L. Foster.)

Q. After Mr. Macartney was hurt you continued unloading that same glass with those same dollies, didn't you? A. We did.

Q. And still are using the same kind of dolly today?

A. I think they made them a little bigger.

Q. A little bigger?

A. Yes, I think they made them a little wider, a little more slope to them.

Q. You mean longer this way (indicating)?

A. No, wider so that they will slope back more.

Q. Slope back more? A. Yes.

Mr. Tatum: That is all.

Redirect Examination

By Mr. Conway:

Q. When they have a dolly wider, Mr. Foster, is it easier [39] or harder to tip over when it has got a crate of glass on it?

A. It is harder for it to tip over.

Q. You say they made them wider since this happened? A. I think so. [40]

* * *

EDWARD M. THOMAS

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

Q. Will you please state your name and occupation?

A. Edward M. Thomas, longshoreman. [41]

* * *

Q. Where were you working on October 10, 1954, on the day that Mr. Macartney was hurt?

A. Well, I was working on the inshore side at the same hatch that Mr. Macartney got hurt in.

Q. On the Wyoming? A. Yes, sir.

Q. When did you start to unload this cargo of glass in No. 4 hatch that day?

A. It was in the afternoon.

Q. Whereabouts on the ship was this glass stored, Mr. Thomas?

A. It was stored in the after end of the Nos. 4 hatch or 5 hatch, if there was six hatches. It was the first hatch back of the superstructure in the after end, toward-ship.

Q. You say you were working on the inshore side? A. Yes, sir.

Q. What side of the ship was Mr. Macartney working? A. Offshore.

Q. How many dollies did you gentlemen have down there when you were working that afternoon?

A. Two.

(Testimony of Edward M. Thomas.)

Q. Mr. Thomas, that picture there, 3-B, is that the number? A. Yes.

Q. Is that the same type dolly that you were using that day? A. Yes. [42]

Q. How many of those did you say were down there on that deck you were working?

A. One on each side; two dollies.

Q. One on each side. Then would you please explain what method you used on your side to get the glass from the ship out on the deck of the ship where it was stored out to the hatch?

A. These dollies.

Q. About how many men were working on one dolly?

A. Well, all four men worked on the dolly at the same time. Sometimes it takes four men to tip one of those cases of glass up. It all depends on the height of it.

Q. Four men. Then when you were working on the inshore side of the hatch that day did you notice which way the deck was sloping as you were moving the glass out to the hatch?

A. You will have to come a little clearer than that.

Q. Can you hear me all right?

A. I can hear you, but I don't know what you want.

Q. Did you notice whether or not there was a slope to that deck?

A. There is always a slope on the deck of the Wyoming. She is built with a high center.

(Testimony of Edward M. Thomas.)

Q. How much of a slope did you notice that day when you were moving the cases of glass out to the hatch from your side of the ship? [43]

A. Oh, it was fairly steep.

Q. How was that brought to your attention? How did you know that?

A. Well, by the work you are putting out. It is harder to push the dolly uphill than down.

Q. You mean when you were pushing the glass out you noticed it? A. Yes.

Q. How many cases of glass had you fellows moved out on your side before this crash occurred?

A. There is no way of telling. I don't even know how many there were in the hatch to begin with. I don't count them. That is the checker's job.

Q. I know, Mr. Thomas, but would it be six or eight or so, or more, in there?

A. We had worked in there, oh, we had worked in there for awhile. I don't know how much. I guess we had taken out a half-dozen or more.

Q. Where were you when Mr. Macartney was hurt?

A. I was standing on the inshore side of the ship in the after end of the hatch. [44]

* * *

Q. Then where was Mr. Macartney at that time?

A. Standing at the hatch coaming by a crate of glass on the inshore side—offshore side, excuse me.

Q. That would be the opposite side from where you were? A. Right.

Q. Did you see the crate of glass fall on Mr.

(Testimony of Edward M. Thomas.)

Macartney? A. I did not.

Q. Do you know what Mr. Macartney was doing at the time the crate of glass fell on him?

A. He was leaning on another crate of glass.

Q. You mean in front of him?

A. It was in front of him, yes.

Q. I mean the crate of glass that he had hold of, was that [45] in front of him?

A. Yes, it was in front of him.

Q. Which way would Mr. Macartney be facing at that time? A. Towards the dock.

Q. Was there any person or persons near the crate of glass that was standing on the dolly behind Mr. Macartney? A. None.

Q. About how large a crate of glass was this, Mr. Thomas, that fell on Mr. Macartney?

A. Well, I would say it was about between 8 and 10 inches thick; maybe, oh, about 53 inches high, about 7 feet long, maybe 8, maybe a little longer. I have never measured it.

Q. Did the ends of the glass stick out over the ends of the dolly? A. Yes.

Q. About how far?

A. I don't know; I never saw that case on that dolly.

Q. In other words, you saw it after it was on Mr. Macartney; is that right? A. That is right.

Q. From the location of the crate of glass after it fell on Mr. Macartney, which way would the crate of glass be with respect to the dock? That is,

(Testimony of Edward M. Thomas.)

would it be facing, parallel to the dock? That is what I mean by my question.

A. Yes, it would be fore and aft with the [46] dock.

Q. Can you give the Court and jury an estimate of approximately how much of a slope there was to the deck of this ship at that time and before this crate of glass tipped? A. No.

Q. You cannot. Can you explain now from your recollection of how this ship was moored at the dock, I mean how it was tied?

A. Well, I never—again, that isn't my job to tie up that ship.

Q. All right. Well, do you know whether it was tied or not?

A. Yes; oh, it must have been or it wouldn't have stayed there if it had not been.

Q. Can you tell us, Mr. Thomas, approximately how much of an incline there would be on that deck from the square of the hatch to the wing and how many feet it would be from where this was moved out? A. Do you want approximately?

Q. Yes.

A. I couldn't do that unless I had the scale of the ship.

Q. Well, I mean was it 20 or 25 or 30 feet from the point where the glass was moved out to the square of the hatch?

A. Well, from where we were getting the glass out to where we was slinging it it was approximately, well, when we started in I would say maybe

(Testimony of Edward M. Thomas.)

we was moving it 14 feet to begin with. Then when we finished up we was yarding it out there 30 feet. [47]

Q. That is all I asked.

A. Because it was not stowed in the wings. It was stowed toward-ship clear across the hatch.

Q. Then how much of a slope was there to the deck in that distance; approximately how many inches?

A. That's the same question but at a different angle.

Q. I mean, in 20 feet——

A. Well, just a second; this isn't right, but the 20 feet that we were going was not from the wing in altogether. You are coming with the sheer of the ship to the hatch and then setting it on the side of the hatch. Just like this courtroom here, if you went back there to get a case, this courtroom had a list in it or tilted, we will say, you go back here and pick up a case, and you got to bring that out here before—you fight that uphill to get it back.

Q. That is what I am trying to find out.

A. Yes.

Q. Well, I appreciate your answer, Mr. Thomas, but what I am trying to find out and maybe I didn't make myself clear, I am trying to find out from the side of the ship to the square of the hatch, for example, would be approximately how many feet? Perhaps we can get that.

A. I would say it was around 18 feet. That is, to the hatch coaming, now.

(Testimony of Edward M. Thomas.)

Q. Yes, to the hatch coaming, and then in that distance [48] how many inches would the floor slope from the side of the ship to the hatch coaming?

A. Again I couldn't tell you because, without the scale of the ship, I couldn't tell you, and nobody else either.

Q. By the way, how long have you known Mr. Macartney?

A. Well, I have known him since 1941, 1942, around there.

Q. Was he able to do a pretty good job of longshoring before this happened?

A. When he wanted to.

Q. Did he have any trouble with either one of his legs before this happened?

A. No. When I first knew the man he was playing hockey. I knew of him.

Q. Did he get around in pretty good shape?

A. He swung a mean stick.

Q. After this accident happened, have you had occasion to see him working on the waterfront once in awhile?

A. Well, I seen him putting in his time.

Q. What difference have you noticed in the way Mr. Macartney gets around now since he got hurt than he did before this happened?

A. No comparison.

Q. What do you mean? Explain to the Judge.

A. He is an old man now.

Q. What? [49]

(Testimony of Edward M. Thomas.)

A. He is crippled. It is just like giving away your arm.

Q. What kind of work does he have to do since this happened when he started to work again?

A. He has to take jobs that comes off of what we call the "bunion board."

Q. What board?

A. B-u-n-i-o-n, "old man's board." Well, it is no living. Maybe if a man has to do it for a living he has to do it. That is all we call it, the bunion board for the men that is ready to retire or pretty near.

Q. I understand. In other words, the way the work of longshoring is set up here in Portland, maybe one month he could work quite a bit from that board, and maybe next month he couldn't work so much. Is that what you mean? A. Yes.

Q. Because the jobs would not be available?

A. That is right.

Q. That he could do, I mean?

A. That is right.

Q. That is right. All right, shortly after Mr. Macartney was injured did you yourself go up on the dock by the ship?

A. Yes, I was on the dock.

Q. Right after this happened when you were up there by Mr. Macartney while you were standing on the dock waiting for the ambulance, did you watch the ship? [50]

A. Well, when we was waiting for the ambulance I looked at the ship, yes.

Q. What did you see?

(Testimony of Edward M. Thomas.)

A. It had a definite list, inshore list.

Q. Did the ship move from time to time?

A. It did. They all do to a certain per cent.

Q. Was the gear on the ship working when the ship was moving? A. Yes.

Q. Which way did you say the ship was moving while you were watching it?

A. Well, it can't move one way all the way, so it has got to go back and forth.

Q. Well, explain to the folks and the Judge what you mean.

A. Well, when you take a case out of the hatch it all depends on the size and the weight and how much boom you got on the dock. When you take a case out of the hold and start for the dock with it, it will lean towards the dock. If you pick a load up off of the dock, it will lean towards the dock every time.

Q. Then the way the ship was moored, Mr. Thomas, with the lines that secured it, how far could it go the other way towards the river?

A. Again, I didn't see—I didn't check the lines. That is out of my line. I don't tie ships up. I just work them. [51]

Q. Could you tell while you were standing on the dock approximately how much of a list there was to the ship? A. No.

Q. Was this particular ship what is known as a tender ship at that particular time?

A. Well, you could say that, I guess, yes.

(Testimony of Edward M. Thomas.)

Q. Just explain what that term means on the water front?

A. Well, a tender ship usually means, usually is a ship that has not sufficient cargo weight, in other words, in the lower holds to what it has in the shelter deck or 'tween deck.

Q. Then what does that condition make the ship do?

A. Top-heavy. Oh, excuse me, you said "do"?

Q. Yes, what does it do when it is that way?

A. Well, it makes that tender.

Q. How long did you stand on the dock and notice that listing you mentioned?

A. Not very long.

Q. Before Mr. Macartney was taken away by the ambulance?

A. Not very long after the ambulance come I went right back to work.

Q. Would that be a few degrees in extent, this list?

Mr. Tatum: If your Honor please, I object to that as leading, in the first place. In the second place, the man has answered he cannot estimate it. [52]

The Court: He has answered it three or four times, Mr. Conway. He is your witness. You cannot put words in his mouth.

Mr. Conway: All right; you may inquire.

(Testimony of Edward M. Thomas.)

Cross-Examination

By Mr. Tatum:

Q. Isn't it true, Mr. Thomas, that all ships work a little bit in the water as they are being unloaded when they are tied up to a dock?

A. All ships?

Q. General cargo ships such as this unloading general cargo?

A. We will answer that by saying some do.

Q. You recognized that this ship was working back and forth as cargo was being loaded or unloaded before Mr. Macartney was hurt; did you not?

A. I did not.

Q. You noticed it while you stood on the dock after he was hurt? A. I saw—yes, I did.

Q. Then you went back to work in the same hatch unloading the same cargo in the same way, did you not? A. Yes.

Mr. Tatum: That is all. [53]

Redirect Examination

By Mr. Conway:

Q. How much cargo was there remaining to be unloaded, Mr. Thomas, after the accident happened, this glass cargo in that particular hatch?

A. Oh, again I don't know how much was in there. Maybe 20 cases; maybe 20 cases.

Q. Do you remember about what time you got through working that afternoon after this happened? A. I do not.

(Testimony of Edward M. Thomas.)

Q. What time did it happen, by the way? Do you remember what time it happened?

A. No; I do not. I don't watch the clock that fast. They have got men to tell me when to quit.

Q. It was a little bit after lunch, wasn't it?

A. That is right.

Mr. Conway: That is all.

Recross-Examination

By Mr. Tatum:

Q. Mr. Thomas, isn't it true that you came to work in that hatch at 1:45 in the afternoon?

A. I don't know.

Q. Do you know whether or not you continued working there until 6:00 p.m. in the same [54] hatch?

A. I am pretty sure we did. That has been a long time ago.

Q. Is it not true that Mr. Macartney was hurt at ten minutes after 2:00 in the afternoon?

A. If that's what you have got wrote down there, that's it.

Mr. Tatum: That is all.

(Witness excused.) [55]

JOHN RAANES

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. * * * Now, how long have you been longshoring? A. Oh, 25, 26 years.

Q. Have you worked in all departments?

A. I wouldn't say in all of them. I have not been driving winch.

Q. You have worked in quite a few of them?

A. Well, yes.

Q. Where were you working on October 10, 1954, on the day that Mr. Macartney was hurt?

A. When Mr. Macartney was hurt I was working partners with Mr. Macartney. [56]

Q. What ship was that?

A. Well, as I recall it, it was the Wyoming.

Q. About when did you start to unload this cargo of glass in No. 4 hatch that day?

A. I don't remember the time.

Q. Was it before or after lunch?

A. As I recall, it was after lunch.

Q. Where was this glass stored on the ship?

A. It was stored in the after end on No. 4 hatch across-ship.

Q. Were you and Mac working on the inshore or offshore side of this hatch?

A. On the offshore.

(Testimony of John Raanes.)

Q. How many dollies did you have working on your side? A. We had one.

Q. Would you take that picture, Mr. Bailiff, and show it to him, the dolly?

(Exhibit presented to the witness.)

Would you take a look at that and see whether that is the same kind of dolly you were using that day, Mr. Raanes?

A. Yes, that looks like it. That looks like the type.

Q. That is the same one we were talking about when we had these depositions taken some months ago. Will you please explain the manner of moving these crates of glass from the [57] hold to the square of the hatch that you and Mr. Macartney did?

A. Well, you take that dolly, take it back to the crates of glass. You tilt up the back of the dolly to get the prongs in front of the dolly and underneath the box, tilt the box and the crate back so it comes back on the four wheels again, and then we ride them back to the hatch—push them back, rather.

Q. You were Mr. Macartney's working partner that day? A. Yes.

Q. How many crates of glass had you and Mr. Macartney moved from inside the ship there out to the square of the hatch before this accident happened on that occasion?

A. That I don't know; that I don't remember, how many.

(Testimony of John Raanes.)

Q. Well, would it be more than five or six?

A. I couldn't say. I couldn't say how many there would be. We put in a little time down there, and we got fairly busy, but I don't know how many we took out.

Q. You had been moving some of them out?

A. We had been moving some, yes.

Q. How long had you been doing this that day before the accident happened? A. How long?

Q. Yes; after the lunch period.

A. I don't remember how long it was. [58]

Q. When you moved the dolly towards the square of the hatch from where the cargo of glass was stowed, did you have to push the dolly uphill or downhill on the deck?

A. We were pushing downhill so we had easy going.

Q. Approximately how far was it from where you moved these cases of glass out to the square of the hatch from where they were stowed?

A. In that particular case I would judge it was about 30 feet coming forward to abreast of the hatch, and then in towards the hatch a few feet, I would say about 30 feet.

Q. Now, then, in what direction was this deck you were working on sloping when you moved all these other cases of glass and also when you moved the one that fell on Mr. Macartney?

A. It was sloping towards inshore.

Q. That would be towards the dock?

A. Yes.

(Testimony of John Raanes.)

Q. Approximately how many inches of slope was there from the river side of the ship to the square of the hatch? A. That I wouldn't know.

Q. Which way was the ship moored at the dock in the Willamette River?

A. Which way? It was heading upstream.

Q. Do you know how many lines the ship had fastened to her at the time when you were working on board? [59]

A. No, sir; that I haven't got any idea about.

Q. How long had this slope or list in the ship been existing before this accident happened that day?

Mr. Tatum: I object to that. He has testified as to a slope; not as to a list.

Mr. Conway: Well, it is all the same thing, your Honor.

Mr. Tatum: I object. It is not.

The Court: Use the word "slope," how long had——

The Witness: Is that the question?

The Court: Yes.

The Witness: Well, I noticed it all morning.

Q. (By Mr. Conway): What did you say, Mr. Raanes?

The Witness: I noticed that list or slope, whatever you call it, I noticed it all morning.

Q. All morning? A. Yes.

Q. Was this an inshore list? A. Yes, sir.

Q. When you and Mr. Macartney got over to near the square of the hatch with this crate of glass

(Testimony of John Raanes.)

on this dolly which later fell on him, how did you leave the dolly with the crate of glass on it standing when you left it after you got near the square of the hatch?

A. We left it standing on the dolly, and it was facing the hatch, parallel with the hatch. [60]

Q. The crate would be parallel with the sheer?

A. Yes, sir.

Q. Did you leave the crate of glass on the dolly?

A. Yes.

Q. Then what did you do after you did that yourself?

A. When we got up there and set the dolly there, I noticed that there was only one man out in the hatch tending to the slings that come in. I couldn't see them yet, but they were coming in, and so I left Macartney and the dolly and walked over to the hatch to help with the sling and sling the case that was already on the hatch.

Q. You were getting ready to have a sling come in, were you? A. Yes.

Q. Did you have a crate of glass out in the hatch?

A. There was a crate of glass in the hatch, yes.

Q. How far ahead of this one crate that was on the dolly was the one that was in the hatch?

A. Well, I didn't measure it. I would say about five feet or so, possibly something like that.

Q. How was it standing out in the hatch?

A. The crate that was on the hatch?

Q. The crate that you were hooking up.

(Testimony of John Raanes.)

A. That was standing on two blocks.

Q. On some blocks? [61]

A. Yes, so we could get the sling there.

Q. How big a case was that, Mr. Raanes?

A. That, again, I didn't measure it. I do know I was standing alongside of it, and I had my hand about like that on top of it (indicating).

Q. Was it a taller case than the one that fell on Mr. Macartney?

A. Well, I think it was just a little taller, yes.

Q. What were you doing in connection with the case that was in the square of the hatch just before the accident occurred?

A. We were getting the sling on the case, and the sling was coming in, and I got hold of one sling, and a man on the other end of the case got hold of the other sling, and we were both trying to slip it on.

Q. What was Mr. Macartney doing at that time?

A. Well, I had maybe more or less my back to him; not the back, the side. I was facing aft on the ship, and Macartney would be on my right. I didn't see the crate or the dolly nor Macartney when he was at the dolly.

Q. I forgot to ask, by the way, what kind of a deck was that you were working on moving this glass forward near the square?

A. Steel deck.

Q. Was it rough or smooth? [62]

A. Oh, fairly smooth. It was dented and a little

(Testimony of John Raanes.)

rough underneath, so it was a little rough, I know by that.

Q. What kind of wheels did the dolly have?

A. As I recall it, it had rubber wheels.

Q. How long was Mr. Macartney near the crate of glass in the square of the hatch with his back to the crate of glass that fell on him before the crate fell upon him that day?

A. I don't know how long he was there. I just happened to see him sort of cornerwise just a little while before the crate crashed on him, possibly, I would say, a couple of minutes.

Q. Was there anybody except Mr. Macartney in the position you have mentioned near the dolly or the case of glass on the dolly at that time before it fell?

A. Well, of course, I didn't see back there. I didn't know of anybody back there.

Q. Were there any cables or lines attached to it or that hit it in any way that would cause it to fall?

A. No, sir.

Q. About how much did that crate of glass weigh that fell upon Mr. Macartney?

A. Well, about I would say around 1,500; possibly a little more.

Q. 1,500 pounds? A. Yes, sir. [63]

Q. Do you remember about what size that particular crate was?

A. Well, approximately, about 10 inches thick, about 4 feet high, and I should judge 7 or 8 feet long.

(Testimony of John Raanes.)

Q. Was the dolly with the crate of glass on it standing all by itself before the crate of glass fell off of the dolly and onto Mr. Macartney at that time?

A. Well, I assume it was. As I say, I didn't see it. I didn't see it when it crashed. I left it——

Q. Immediately afterwards, did you see anybody there besides him? A. No, sir; no one.

Q. You would have if there had been, wouldn't you? A. If——

The Court: I think that is argumentative. Go ahead.

Q. (By Mr. Conway): Which way was Mr. Macartney facing at the time this crate fell on him?

A. He was facing the dock.

Q. How did it fall on him? A. How?

Q. Well, I mean what position was the crate on him when it hit him?

A. Well, it apparently hit him right across the legs below his knees and took him along down.

Q. What position was he in when the case stopped falling? [64]

A. I would say he was practically sitting on it. He couldn't fall forward because the other crate was in his way. The only way he could was to fall backwards on top of the crate that hit him, but he was more or less hanging on.

Q. Where were his legs?

A. Underneath the crate.

Q. How many men lifted that off him?

A. Well, that I don't know, if they were all

(Testimony of John Raanes.)

there or not. I never looked around. Whoever was there, we grabbed hold and lifted it off. If they are all there, I don't know.

Q. About how long have you known Mr. Macartney?

A. Well, I would judge somewheres in the '30's. I don't remember when first I met him.

Q. Was he able to do a pretty good day's work longshoring before this happened, from your observation?

A. I worked with him several times, and he was a good worker.

Q. Did he have any trouble with either one of his legs before this accident happened?

A. Not that I could observe.

Q. He got around in pretty good shape?

A. He got around good.

Q. After this accident occurred, have you had occasion to see him working on the waterfront once in awhile?

A. No, I haven't, because I work in the hold as a rule, and [65] he worked in the dock after he was hurt. He doesn't come down in the hold. At least I didn't see him down in the hold.

Q. You say you have been working in the hold most of the time yourself?

A. Yes, sir.

Q. Have you had occasion to see Mr. Macartney since his accident, occasionally?

A. Oh. I see him walking along on the dock; yes, sir.

Q. What difference have you noticed in the way

(Testimony of John Raanes.)

Mr. Macartney gets around now at the present time, since he got hurt, and before this happened?

A. Well, he gets around rather poorly. [66]

* * *

Q. Did you gentlemen finish unloading the cargo that day of glass?

A. I don't even remember that.

Mr. Conway: All right; you may inquire.

Cross-Examination

By Mr. Tatum:

Q. Have you seen this sketch, Exhibit 27, Mr. Raanes? Can you see it from there?

A. Yes, I can see it.

Q. I have got marked up there at the top of the crate which is on the blocks an "R." Is that about where you were standing when Mr. Macartney was hurt?

A. Well, I don't quite get that.

The Court: Show it to him.

(Exhibit presented to the witness.)

The Court: Where is the hatch?

The Witness: Where is the crate there?

Q. (By Mr. Tatum): The crate is the red box there, and the crate on the dolly is the red box.

A. And the forward end of the ship is up?

Q. At the top; that is correct.

A. Well, then, you have that—I was in the—yes, I was in the forward end of the hatch. That is right.

Q. Was Mr. Macartney about where the black "X" is when the [67] load of glass fell on him?

(Testimony of John Raanes.)

A. Do you have that right there? I am afraid I don't get that drawing correctly.

Q. You have been sitting in the back of the courtroom and have not been able to see it. This is the port side of the ship, the offshore side. Here is the starboard on the dock side. This entire area represents the square of the hatch from coaming to coaming, from bulkhead to bulkhead, this square of the hatch. A. Yes.

Q. Covered over with hatchboards.

A. That is right.

Q. And the black things here are the blocks upon which you rested loads to be taken out?

A. Yes.

Q. These things are supposed to represent the dollies? A. Yes.

Q. And the red box-like affair is supposed to be a crate of glass? A. A crate of glass.

Q. You remember last December when Mr. Conway and I took your testimony here in the courthouse? A. Yes.

Q. It is my recollection that you said that you were standing up here where this "R" is. [68]

A. That is correct, in the forward end of the hatch.

Q. In the forward end of the hatch, putting the sling around the forward end of that load?

A. Yes, that is correct.

Q. And somebody else whom you didn't remember, another man of your gang that I have marked with a "3" down here was putting a sling around

(Testimony of John Raanes.)

the after end? A. Yes, that is right.

Q. And Mr. Macartney, when you went up to put a sling around the forward end, wasn't he standing here holding onto the load that was on a dolly?

A. When I left him he was still hanging onto the loading dolly.

Q. Then you went up and brought the slingload around? A. That is right.

Q. You didn't see what he did except out of the corner of your eye you saw him come up, and then you heard the load fall on him?

A. That is right, Macartney came up to the box. He had his hand on the crate on the hatch.

Q. Then the load fell on him from behind?

A. That is right.

Mr. Tatum: That is all. Thank you.

(Witness excused.) [69]

FRANK DeFRANCISCO

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. How long have you been doing work as a longshoreman? [70] A. Oh, the last 12 years.

Q. Have you worked in all departments?

A. Practically all of them.

(Testimony of Frank DeFrancisco.)

Q. Where were you working on October 10, 1954, on the date that Mr. Macartney was hurt?

A. On the Wyoming.

Q. About when did you start unloading this cargo of glass in No. 4 hatch that day?

A. It was shortly after 1:00 o'clock.

Q. Whereabouts was this glass stored on the ship?

A. After end of the ship.

Q. Whereabouts were you working yourself on that occasion?

A. Inshore side.

Q. Where was Mr. Macartney working?

A. Offshore.

Q. On the same deck?

A. Yes.

Q. How many dollies did you gentlemen have on your side, and how many did Macartney have on his side?

A. Well, I know we had one in our side. They had one on theirs, I believe. Well, they would have to have one to work.

Q. Mr. Clerk, would you show the gentleman the pictures over there, beginning with 3-B?

(Exhibit presented to the witness.) [71]

Does that look like that dolly that you were using that day?

A. Yes, that's a glass dolly.

Q. When you were moving the glass from your side of the ship up to the square, did you notice whether or not there was any slope on the deck?

A. Yes, there was a slope on the deck.

Q. Was that existing all the time you were working that day before this accident happened?

(Testimony of Frank DeFrancisco.)

A. Yes.

Q. How long had you been working before this accident happened?

A. Oh, I couldn't give you an approximate time. We had uncovered at 1:00 o'clock and went down into the hatch, and it might have been probably about, oh, close to 2:00 o'clock; somewhere in there.

Q. You mean it was about 2:00 o'clock when this happened?

A. I think it happened a little after 2:00. I am not quite sure. Nobody kept time on that.

Q. That is all right, just approximately.

Was Mr. Macartney working with somebody else on the other side?

A. Yes, he was working with the three other men on the other side. There is four men to a side on discharge.

Q. Do you know about how many crates of glass had been moved [72] out on their side before this accident happened?

A. No, I don't keep track of that. All we are down there for is to move the cargo.

Q. Did you see Mr. Macartney just before this accident happened when he was out there near this crate of glass that was in the square of the hatch?

A. No, I can't say I did. We had just moved a crate, and they had taken it out, and we was going back for another crate with our dolly and didn't pay much attention to what they were doing on their side.

Q. When did you first know about the accident?

(Testimony of Frank DeFrancisco.)

A. Well, I heard a yell, and Mr. Macartney let out a yell, and I turned around and see the glass on him, dashed over, picked it up and got him out from under it.

Q. How far away were you from him when you heard him holler?

A. Well, probably 15, 20 feet.

Q. That would be on the inshore side?

A. Inshore side. We had started back. We hadn't quite got back to the glass when we heard a noise, heard him making a noise, and turned around and started over to pick the glass up. [73]

* * *

Q. Where had you been working that day before you worked this hatch?

A. We were working back in 5.

Q. What had you been taking out of there?

A. Well, it was—I think we had some nails, kegs of nails, wire, some steel products.

Q. Steel and wire? A. Yes.

Q. Was the hatch empty or loaded when you got through?

A. Well, the hatch, right in where we were working when we left it was fairly empty. There wasn't much cargo in there.

Q. Then what was the situation below the deck in the hatch you were working on? Was that loaded or empty? A. It was empty.

Q. When that condition exists on a ship that you are working on, what takes place? What happens?

(Testimony of Frank DeFrancisco.)

A. Well, if the hull is empty and you have more weight above, it makes it bob a little more. It is a little crankier. [75] The ship is a little crankier.

Q. At any rate, it makes the ship crankier?

A. Well, we call it cranky. When you hoist anything out, it will rock a little more than usual. If you have more in the bottom of it, it is a little more stable, not quite so rocky.

Q. You mean it rolls back and forth; is that what you mean?

A. Well, yes, a ship rolls with the motion of the water, and hoisting of cargo back and forth will make it move.

Q. That deck there, what kind of a deck was it where they were moving the crates of glass?

A. Steel deck. They are steel ships.

Q. Was it rough or smooth?

A. Well, they are fairly smooth.

Q. Was this condition of listing you have mentioned existing all the time before this happened after you started working that hatch?

A. Well, on most of your ships there is usually a little list inshore. When you put your booms out, these big booms, they set out over the dock onto the dock there, and you have a little extra weight. It throws it off a little off-balance, and so that gives it a little permanent list all the time.

Q. What happens when you take a 1500-pound case of glass out on a boom over the dock? Then what happens?

A. It will move a little bit. [76]

(Testimony of Frank DeFrancisco.)

Q. Which way?

A. Any time you come out onto the end of a boom, get that weight moving, it will move a little bit.

Q. Which way will it list, then?

A. It will list inshore, the booms inshore.

Q. Does that happen whenever you get a heavy piece of cargo on the end of the boom?

A. Yes, it will.

Q. Was there another hatch working that day besides this one you were working?

A. Yes, there was one hatch working.

Q. Which way was Mr. Macartney facing at the time this crate of glass fell on him?

A. I don't know; I couldn't tell you which way he was facing when it fell on him, but when we went over to pick him up he was laying flat on the deck. He would be facing inshore. When we picked the glass up, he was facing inshore.

Q. How long have you known Mr. Macartney?

A. Well, probably about, around eleven or twelve years.

Q. Was he able to do a pretty good day's work longshoring before this happened?

A. Yes, he was quite active before this happened.

Q. Did he have any trouble with either one of these legs before this occurred?

A. Not that I know of. [77]

Q. Could he get around in pretty good shape?

A. Yes; like I say, he was quite active.

(Testimony of Frank DeFrancisco.)

Q. After this accident happened, have you had occasion to see him occasionally? A. Yes, sir.

Q. What difference have you noticed in the way he gets around now since he got hurt than he did before this happened?

A. Well, he has slowed up quite a bit.

Q. In what way?

A. Well, he don't walk as fast or quick, and he can't lift. I had him on several jobs where he has worked for me—well, let me explain that a little different now. I am what they call a casual walking boss, and I have gangs that work for me, you know, I supervise the work, and I have had Mac several different times working under my supervision.

Q. Since this occasion, since this accident happened what have you noticed about his work?

A. Well, he can't lift too much. You get anything that is heavy, he can't handle it.

Q. You mean he has to have the easier kind of jobs now?

A. That's right. I don't think he works in the hold of the ship any more.

Q. What board does he work off at the hall; do you know?

A. Well, he works off what they call the old man's board or bunion board. [78]

Mr. Conway: You may inquire.

(Testimony of Frank DeFrancisco.)

Cross-Examination

By Mr. Tatum:

Q. In your experience on the water front, Mr. DeFrancisco, isn't it true that all ships while they are being loaded or unloaded work a little bit in the water back and forth?

A. Usually they do rock back and forth.

Q. Not only by cargo but a passing ship might make it go?

A. Yes, that is right; it will bob.

Q. It is something that you experienced long-shoremen are aware of? You know about it?

A. Yes, I know about it.

Q. And in your loading or unloading operations you always take that into account on how you are working, do you not, that the ship is going to be moving a little bit?

A. Well, yes, if you put it that way, it is something—when you work on a ship like that there you get used to that movement, and it's just like working out here on the floor, it don't bother you. It don't actually bother you in any way.

Q. Do you remember what size of crate it was on this dolly that fell on Mr. Macartney?

A. It was a low one. It was not very high, approximately so (indicating). [79]

Q. A short, squat, heavy case?

A. That is right.

Q. Did you work with glass before with these

(Testimony of Frank DeFrancisco.)

kind of dollies, before this accident? A. Yes.

Q. Isn't it true that when you are working with a short, squat and heavy case that you have to hang onto the glass all the time to keep it from falling off, you as longshoremen, I mean?

A. Well, no, you don't have to hang onto it all the time. If you are pushing it and if you push on a downhill slope, you have to hold it or it will tip over, but if it is sitting still it won't fall, if it is level.

Q. But you do not dare let go because as soon as you let it go it will start dropping; isn't that right? A. Well, if it is on a tilt, it will.

Q. If there is this constant movement on a ship, the rocking back and forth that we have talked about, you conduct your work accordingly to protect yourself, don't you? A. That is right.

Q. You have to? A. That is right.

Q. And if the thing is going to move you can't expect it to stand still, can you?

A. Well, that would depend what your balance was on whatever [80] you have there. If you have a big crate there, it will stand—it would have to take an awful list to roll a big crate over.

Q. So you are just going to stay there and hold a dolly; isn't that right?

A. Well, that's right, it would. If it is a real tippy one, you have to stay there.

Q. And hold onto the dolly? A. Yes.

Mr. Tatum: That is all.

(Testimony of Frank DeFrancisco.)

Redirect Examination

By Mr. Conway:

Q. These dollies that you had been moving a case of glass over before this happened, Mr. DeFrancisco, as I understand, there were several cases of glass moved over from Mr. Macartney's side before this happened; that is right?

A. That is right.

Q. Was there any difference in the method of operation of moving these other cases of glass up to the square of the hatch and taking them than there was for this particular one? A. No, not——

Q. It was all the same, wasn't it?

A. The procedure is all the same. It is just the difference of the size of the case. [81]

Q. Is that the usual and customary manner of moving that particular kind of cargo?

A. Yes, it's the easiest way, getting it out with them dollies.

Q. It is also customary for the longshoremen to just have a dolly sit with a case of glass on it and then leave it sitting all by itself like this one was and then hook up another one in front of it and go out?

A. Yes, we have. It all depends on the way we are working. Sometimes we are pushing a job a little harder working—you know what I mean—a little faster, something like that, and we do occasionally take a load of glass and leave it there and

(Testimony of Frank DeFrancisco.)

go back after another one. I don't know just the way you set a pace of work.

Q. I mean that's what they were doing, the boys, that day?

A. Well, I imagine that's what they had done at the time because they had one load out there, and they had the other one on the carriage bringing it down.

Q. Isn't that the way you unload the glass right along?

A. Well, I would say—well, I don't know now, on our side when we were working we were just bringing one out at a time. Just like I say, we had already set one out, and we were going back for another one that—well, once in awhile they will play around and wrestle another one up before you get rid of one, something like that, they will load up. [82]

Q. I mean, you did either way; isn't that right?

A. That's right; it all depends who you have you are working with. If they are a little quick on doing something, why, they——

Q. Was there any cables or gear near or attached to this case of glass that fell on Mr. Macartney before it fell on him?

A. No, there was nothing but the crate of glass on the dolly.

Q. Was the dolly and the crate of glass standing by itself?

A. That I don't know. I wasn't paying any attention to it.

(Testimony of Frank DeFrancisco.)

Q. I mean, right after it fell you didn't see anybody there, did you?

A. No, Mr. Macartney was under the glass hurt, and the other fellows were still holding onto the sling at the time it happened.

Mr. Conway: All right; that is all.

Mr. Tatum: That is all.

The Court: I want to ask you something. Did you say that this work was being done in the usual and customary way?

The Witness: That is right.

The Court: Was the use of dollies the usual and customary way of taking out this glass?

The Witness: Yes, it is with these cases of glass. Did [83] you see that picture of it? It has four wheels and a little plate at the bottom, and you take this up to a crate of glass standing up, and you tip the glass over a little bit, slip this deal under the edge, and you slide your box back on top of it, and that eases it down to the ground on all four wheels, which leaves it all free, and you push it about wherever you want to push it.

The Court: That is all.

(Witness excused.) [84]

HOWARD L. CHERRY

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Conway: [85]

* * *

The Court: His qualifications are admitted.

Mr. Conway: All right, your Honor; very well.

Q. Doctor, when did you first treat Mr. Macartney?

A. In regard, as to his legs or other injuries?

Q. In regard to his injuries that he received on October 10, 1954.

A. I first treated him at St. Vincent's Hospital immediately following his admission on October 10, 1954.

Q. As part of your work, Doctor, have you had experience in taking and reading X-ray pictures?

A. I have X-ray pictures taken for me and then read them, yes.

Q. About what time was it that you saw Mr. Macartney at the St. Vincent's Hospital on October 10, 1954?

A. I may be able to get the time from a chart. I do not have it in my notes here.

Q. Would you hand him the hospital records?

(Documents presented to the witness.)

The Witness: He was admitted at 3:00 o'clock

(Testimony of Howard L. Cherry.)

in the afternoon, and I saw him very soon thereafter.

Q. What did he complain of at the time you first saw him? [86]

A. At the time he came in he had two severe compound fractured legs with the bones sticking out through the skin on both sides.

Q. Was he suffering any pain when you first saw and examined him? A. Yes.

Q. What did you then do, Doctor?

A. We treated him for pain and got him in shape and took him to surgery and operated him on the same day that he came in.

Q. About what time did you perform an operation?

A. The anesthetic was started at five minutes after 4:00, and we operated for about an hour and a half following that; finished at 5:45.

Q. Then just explain briefly to the jury the nature and type of operation that you did for him.

A. The fractures involved both legs below—between the knees and the ankles, and each side was—had several different fragments, and there were large wounds in which the bone was sticking through the skin on each leg. These were treated by surgically cleaning both legs and then reducing them, that is, putting the bones into their approximate proper position and then fixing them in place with what we call a Lottes intermedullary rod. One of these we placed in each leg. [87]

(Testimony of Howard L. Cherry.)

Q. How large is a rod? Have you got one there handy?

A. I brought a sample with me. The diameters are the same as this. The lengths vary according to the demand.

Q. What would the approximate length of that be, Doctor, that rod? A. Pardon me?

Q. What would the approximate length of that rod be?

A. This particular rod is 11½ inches.

Q. Is that about the same type and size rod you placed in each leg of Mr. Macartney?

A. It is the same diameter, and I believe that the rods that we used are a little longer than this.

Q. How large diameter is the rod that you placed in his leg?

A. This is three-eighths-inch.

Q. Is that the same size you put in his leg?

A. Yes, same diameter.

Q. What is that made of, Doctor?

A. Stainless steel.

Q. Is that supposed to last as long as the man lives?

A. It ought to last as long as the man lives, surely.

Q. Then does he have one of those particular type rods in each leg now?

A. There is one in each leg; that is right.

Q. Where do they begin and where do they end, Doctor, in [88] each leg?

A. It is inserted just below the knee, and it runs

(Testimony of Howard L. Cherry.)

down within the medullary canal or the marrow canal to just above the ankle so it does not involve either the ankle or the knee but threads the bone fragments over it.

Q. Is that on the front part or back part of the leg that rod is inserted?

A. It is inserted from the front and goes right down the middle of the tibia or the big bone in the leg.

Q. Explain to the jury what you mean by the tibia?

A. There are two bones extending from the knee to the ankle. The tibia is the larger and the much more important one as far as function and weight-bearing goes, and he fractured both the tibia and the fibula on both sides, and many fragments. The only one that we fixed is the tibia because it bears by far the greater portion of the weight, and the fibula will heal if the tibia is held at proper position.

Q. Did you also take X-rays on that occasion, Doctor; that is, cause them to be taken before you operated?

A. Yes; we had X-rays taken before we operated, during the operation, and many since.

Q. Do you have those X-rays with you now that the custodian of records brought from the hospital?

A. Yes.

Q. Would you please stand by the viewbox there and show the [89] jury and explain what they show and when they were taken.

(Testimony of Howard L. Cherry.)

A. This X-ray says "St. Vincent's Hospital." It is dated 10-10-54. It has his name written, Walter Macartney. This is his left leg, the ankle being at the bottom here and the knee-joint you can barely see here. The view on my left is looking straight ahead. The film is put behind the leg, the X-ray machine in front, and the picture is taken straight through. It shows a fracture of the tibia at this level (indicating) and of the fibula slightly higher with extra fragment present here (indicating).

Now the other film is also his left leg, and it is taken with the X-ray machine at the side and the film on the inner side, and it shows the same thing. There is another thing to be noted. The skin line comes right along here, and you can see from this film that a big portion of the bone is protruding through the skin.

Q. Doctor, was that X-ray taken before operation?

A. This was taken before the operation, yes.

Q. On the same day he came in?

A. That is correct. The last film was Exhibit No. 7-C. The film I am about to show is Exhibit No. 7-D. It has a marker as part of the film and is dated 10-10-54, St. Vincent's Hospital, and has the name Walter Macartney on it. This shows his right leg. This is an AP, or taken forward-backward as the last one was. It shows a complete fracture [90] at this level with some fragments and a second fracture about three inches below the knee and also that this main fragment is split for most of the

(Testimony of Howard L. Cherry.)

distance. The same thing is seen on the lateral view. That is an X-ray taken through from the side and shows the fracture at the junction of the middle and distal third or middle and lower third and also the upper portion, and again shows this upper fragment split for about half its distance, and again this one is compound at the side of the lower fracture but not above. By the term "compound" you mean that the bone is protruded through the skin, exposed through the skin.

Q. Doctor, show the jury on there while you have the picture in front of you where you placed those rods you mentioned.

A. I can show on the next film the rod in place.

Q. By the way, what was the name of that film you are just talking about that you just got through with?

A. I gave the number there.

Q. Thank you, Doctor.

A. This next film is Exhibit 7-E. The next two films are taken from the hospital while he was still in on the first occasion and just represents some follow-up films. Many of them, they are much alike. This one is dated 11-8-54, St. Vincent's Hospital, and has the name of Walter Macartney on it. This shows the rod in place on the left leg. The knee is just at the top of the film, and the rod is inserted [91] from the front through a hole drilled in the bone and then threaded through the canal of the tibia to hold it in place. This shows the lateral view looking at it from the side. This shows it in the anterior-posterior view, and the rod down the center

(Testimony of Howard L. Cherry.)

of the bone is what holds the fracture in place. The next one is 7-F.

Q. What was the date of that last film, by the way, Doctor?

A. The date of this film is 12-28-54.

Q. The one you just got through talking about?

A. That one was 11-8-54.

Q. Thank you.

A. We could get these the same day. It does not matter particularly. This shows the same thing on the right leg in which the rod is placed above the upper fragment down through the main middle fragment and across the second fracture and through the lower fragment so that it is threaded on both of the fractures to hold them in place. You notice that we disregard the fracture of the small bone. If we hold the big bone, the small one will be all right.

These two films are late films. This one was taken in my office under my direction. The date is 11-16-56, and it is Exhibit 7-B. This is the left leg, and it shows the rods still in place. It shows solid healing by the fracture site of both the tibia and the fibula.

Q. Does that also show the rod in there? [92]

A. Yes, this shows the rod in place.

This is Exhibit 7-A, which is his right leg. It again shows the rod in place, shows the fracture solid, all fractures solid and two fractures of the tibia and a fracture of the fibula, with rods.

Q. The date of that film, Doctor?

(Testimony of Howard L. Cherry.)

A. The date of this one, I guess it, I can't make it out. It is August or September of 1955. Again, there are many films, and we could select any other date. The edge of the marker is off of this, but it is either the 8th or 9th to indicate August or September, 1955.

Q. Would the conditions be the same anyway?

A. Yes.

Q. What is the purpose, Doctor, of putting a rod of that type into these particular legs of this man?

A. This is a relatively new method of treating fractures especially in the tibia, and the purpose is to hold the fractures in their proper position, and he is, I feel, very fortunate in having had these. I feel it has cut his convalescence time and his ultimate result, cut the time way down, and gives him a much better result than any other method he could have had.

Q. While you performed this operation upon Mr. Macartney, was he unconscious during the time? I mean he was under the influence of anesthetic, naturally? [93]

A. He had a spinal anesthetic, and he would not necessarily be unconscious at the time.

Q. Well, from the nature of that anesthetic could he feel any sensation while the operation was being performed?

A. He could not feel any sensation in his legs. It is a regional spinal anesthetic, which would make him numb from his hips on down.

Q. Then did you also give him something for

(Testimony of Howard L. Cherry.)

pain, you say, before that? A. Yes.

Q. What would be the effect of the medication you gave him for pain before this operation took place?

A. Well, the effect would be to relieve his pain, and it also makes him a little dozey and oblivious to a degree to what is going on around him.

Q. In other words, he would not know very much about what was going on around him, would he? A. I doubt that he would.

Q. Were each of these leg-bones broken in more than one place?

A. The right tibia was broken between the middle and lower third and then severely in the upper third, and the fibula was broken at one level. On the left tibia the major break is at the level of some small fragments at that level in the tibia, and the fibula is broken in several fragments. [94]

Q. How long was Mr. Macartney confined to the hospital while you were attending him?

A. He was in the hospital on the first admission for 34 days. I might mention that that is an extremely short time for such severe fractures as this, which is attributable to this new method of treating the fractures.

Q. All right, then, Doctor, just to save time, just go ahead and explain the sequence of events after his first operation, what you had to do, and how long he was in the hospital, and so forth.

A. He was treated in the hospital first with compression dressing, that is, a very thick cotton com-

(Testimony of Howard L. Cherry.)

pressive reinforced with plaster splints and then the plaster cast to well above his knees. Then walkers were placed on these casts. Then we had bilateral long-leg braces made, and we succeeded not in getting him into both long-leg braces at once but having one cast in a brace, then going and putting the other one in the cast and the other one in a brace. The trick here, of course, is, having two broken legs, we have two broken legs and two crutches, to try to get them going as soon as we can, and we went from one to the other in casts with braces in order that he could be out of the hospital and walking around enough to take care of his personal needs, and these were carried on for several months until he was able to walk with just the braces, and eventually he could walk with just braces [95] and no crutches.

We hospitalized him the other time on October 30, 1954. He was in the hospital for 15 days. This was in a period that he was unable to maintain himself with the walking casts outside, and we had to bring him in again because he couldn't take care of his needs in that manner. Then he was followed in the office essentially ever since this time.

Q. When did you last check him, Doctor, at your office?

A. I last saw him on November 16th. Wait a minute—yes, that's right, November 16, 1956.

Q. While he was in the hospital the first time, Doctor, did he suffer pain?

(Testimony of Howard L. Cherry.)

A. Surely, there is some pain, as you say, with fractures.

Q. Did he have to have medication for pain?

A. Yes.

Q. About how often would you see him while he was your patient there at the hospital?

A. I would see him every day.

Q. Then when he came back, you say, the second time, what happened?

A. He was brought in because he couldn't get around with his casts, and he was—the casts were changed, and he was kept down in a wheel chair in the hospital until such time as he could get up and take care of himself again.

Q. Do injuries of this nature that you have described that [96] Mr. Macartney sustained result in any limitation of motion or use of these injured legs of Mr. Macartney for the rest of his lifetime?

A. Yes.

Q. While he was a patient of yours in this hospital, did he complain to you of pain in both of his legs?

A. I presume.

Q. That would be the usual result of this situation, wouldn't it, Doctor?

A. Yes.

Q. What type of a pain is that, Doctor, that kind of pain? I mean does it last very long at a time, or does it come and go or what?

A. Well, it's a little hard for me to answer that. They do have pain, and it is intermittent, usually, and it is usually of gradually less severity following

(Testimony of Howard L. Cherry.)

the time of their injury. I presume you mean now the pain early in his hospitalization?

Q. That is right, Doctor. A. Yes.

Q. And then while he was there while you attended him, did you observe any objective symptoms that would indicate the existence of pain?

A. I don't think I can answer that. The usual thing is that if they complain of pain and we think that they have had [97] sufficient injury to account for pain, we give them something for pain. Pain, after all, is a subjective finding; not an objective one.

Q. In your opinion, Doctor, with reasonable certainty, are these injuries you have described the producing cause of the pain which Mr. Macartney suffered, suffered while he was your patient in St. Vincent's Hospital? A. Yes.

Q. And has Mr. Macartney permanent injury to each of his legs as a result of these injuries that you have described? A. Yes.

Q. What is the nature of these permanent injuries?

A. He has some restriction of his ankles which I have judged at 70 per cent of normal. He has some weakness in his legs, meaning mostly that they could not be expected to stand up to prolonged usage, prolonged hard usage, and there is a factor of pain that is the residual of a major bone injury which is intermittent and often is present the rest of the patient's life, and it is often affected by weather, and he can expect to have some pain of

(Testimony of Howard L. Cherry.)

that nature as a permanent residual of these fractures.

Q. That pain would be around his knee?

A. It could be around his knee, his ankles, or in the shaft of the bone.

Q. You mean all the way from the knee [98] down?

A. It could, yes.

Q. In either leg?

A. Yes.

Q. What can he do to relieve that pain when it occurs at this time? Supposing he would have it, we will say, yesterday while he was cutting the grass, then what would he have to do about it?

A. The greater part of his pain usually would be due to effort, or a good portion of it, and by cutting down the amount of effort and amount of work that he does he would cut down the amount of pain. Also, if he had pain of sufficient magnitude, some analgesics, empirin, aspirin, codeine, something of that nature would relieve his pain.

Q. In other words, he would have to take medication or else he would have to also sit down and not walk around?

A. That's right, or——

Q. Is that what you mean?

A. There is the third alternative, to endure the pain.

Q. I didn't hear.

A. I say the third alternative is to endure the pain.

Q. What effect will these injuries to each of Mr. Macartney's legs have upon his ability to do

(Testimony of Howard L. Cherry.)

regular general work as a longshoreman for the remainder of his lifetime?

A. I doubt that he could stand up to hard longshore work the remainder of his lifetime. [99]

Q. Doctor, based upon your entire knowledge and study of these injuries of Mr. Macartney and his present physical condition, I will ask you to what extent will these injuries and physical condition reduce his physical ability to perform manual labor such as general longshoring work?

A. That is a difficult question for me to answer. I would say that I do not believe that he will ever get back to the harder part of longshoring which requires getting in and out of holds and requires him to be quick on his feet and sustain heavy loads and lift and bend. He can do lesser functions that do not require these heavy functions at longshoring, but I do not believe he will ever get back to general longshoring.

Q. For example, will he be able to be in a position like loading wheat on a ship, for example, where he could sit down and just guide it through a spout? He could do that, couldn't he?

A. I am sure he could do that, yes.

Q. But he couldn't do the same kind of work he was doing when he got hurt, this pushing of crates of glass around, and so forth?

A. I am not fully aware of what pushing crates of glass around entails, but he would not be able to do heavy general longshoring work such as they are generally called upon to do.

(Testimony of Howard L. Cherry.)

Q. Involving the exercise of manual labor?

A. That is correct. [100]

Q. Do you think that will be his condition the rest of his life?

A. I feel that it will, yes.

Q. Assume, Doctor, that Mr. Macartney, who was 45 years of age on October 10, 1954, had prior to October 10, 1954, enjoyed reasonably good health and was physically strong, was working regularly as a longshoreman in the hold of a ship helping unload large crates of glass weighing about 1,200 pounds or more and that on the afternoon of October 10, 1954, while he was so working a large crate of plate glass, approximately 8 feet long, 10 inches thick, and 3 or 4 feet high, and weighing approximately 1,200 pounds or a little more, tipped off of a dolly from behind Mr. Macartney and fell down upon both of his legs from behind, throwing him down to the deck of this ship face down, and he had to be conveyed to St. Vincent's Hospital by ambulance where you did attend and examine him and operated upon Mr. Macartney as you have described and kept him under your care and observation as you have stated. Now, assuming these facts, Doctor, and from your own knowledge and experience as a physician and surgeon, can you state with reasonable certainty what, in your opinion, was the cause of Mr. Macartney's injuries and disability?

A. I feel that this accident as described is the cause of his accident and disability.

(Testimony of Howard L. Cherry.)

Q. How long will these steel rods have to remain in each of [101] his legs?

A. We do not remove them unless they cause some symptoms of some kind, and his appear to be intact and are not protruding through the bone, and I feel it will not be necessary to remove them.

Q. Now, there was some suggestion by somebody that Mr. Macartney used to play hockey before he got hurt. Could he play hockey today with these?

A. I don't believe so.

Q. Can he climb up and down a ladder or walk on the ship where he is required to do a lot of climbing in his work?

A. I think he could probably climb up and down a ladder once or twice, three times, but you don't do it continuously during his work.

Q. He cannot do heavy lifting work?

A. Not sustained heavy lifting. [102]

* * *

ANDREW J. WEBER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. How long have you been working as longshoreman in Portland?

A. About ten and a half years.

(Testimony of Andrew J. Weber.)

Q. Have you worked in various phases of that occupation? A. Yes.

Q. Where were you working on October 10, 1954, on the day Mr. Macartney was injured?

A. I was at Terminal 1 on the ship Wyoming.

Q. What was your job at that time?

A. I was a hold man.

Q. Tell the jury and the Judge what you mean by that? [105]

A. That is a man that works in the hold discharging or loading cargo.

Q. What hatch or hold were you working in at that time?

A. We worked in two hatches that day; No. 5 and No. 4, I believe.

Q. What had you been taking out of No. 5?

A. We were discharging steel and wire, I believe.

Q. When did you get through doing that on that occasion, Mr. Weber?

A. Well, I believe we finished it at either noon or shortly after.

Q. Where did you move to?

A. We moved to No. 4 hatch.

Q. What was in No. 4?

A. Various sized cases of glass.

Q. How was it stowed on board ship?

A. I believe it was stowed fore and aft in the trunk of the ship, after end of the trunk.

Q. Where were you working with respect to Mr. Macartney that afternoon on the glass cargo?

(Testimony of Andrew J. Weber.)

A. I was working on the offshore side.

Q. On the offshore side?

A. Of the ship.

Q. Where was Macartney?

A. He was on the offshore side, also. [106]

Q. Then you had just recognized the gentleman who testified a little while ago, too, over there, didn't you?

A. Yes; he was Mr. Macartney's partner.

Q. Then what was the nature of your particular job?

A. It was to pick up the glass and, well, bring it out to the square so we could discharge it.

Q. In other words, you would help one of the boys put a crate of glass on one of these dollies we have been talking about and move it out to the square?

A. Yes.

Q. Would you show the gentleman the picture, Mr. Clerk?

(Exhibit 3-B presented to the witness.)

Does that look like the dolly that you were using that day, Mr. Weber?

A. Yes; it does.

Q. I don't mean exactly the same, but I mean the same type dolly?

A. It's the type we do use.

Q. Same type and size?

A. Yes.

Q. How many crates of glass had this gang on your side taken out that day before Mr. Macartney got hurt?

(Testimony of Andrew J. Weber.)

A. Well, it's pretty hard to remember. I would say about six or eight cases perhaps.

Q. Were they all the same size or different size cases? [107]

A. They were various sizes.

Q. Then they would weigh more or less according to the size of the case, wouldn't they?

A. Yes; they would.

Q. How was the ship moored to the dock at the time, Mr. Weber; do you remember?

A. Well, it was moored by its mooring lines.

Q. Do you know about how many?

A. How many lines; well, I wouldn't notice that.

Q. Well, was it the usual way they moored the ship? I mean, you can tell, can you?

A. Well, the average ship would use around six lines to moor it.

Q. As far as you know, that was the way that was?

A. As far as I know, yes.

Q. Then was the bow upstream or downstream with the dock?

A. The bow was upstream.

Q. Which deck of the ship was this glass cargo stowed on?

A. It was in the shelter deck. That is the deck below the main deck.

Q. About how large was the opening on the square of this hatch we have been talking about, just approximately how many feet across about, we will say?

A. Oh, about 20 feet across by—

Q. Could it be a little more or less? [108]

A. Yes; it would vary.

Q. You are just estimating?

A. Yes.

(Testimony of Andrew J. Weber.)

Q. Did you see yourself what Mr. Macartney was doing just before the accident occurred?

A. Just before the accident Mr. Macartney and his partner brought a case of glass down, and, well, they stopped it abreast a case that was already in the hatch or out in the square of the hatch to be discharged.

Q. How was the case out in the square of the hatch placed at the time you are talking about?

A. Well, it is placed on blocks so we could get a sling under it.

Q. What was the size block?

A. Oh, I imagine about 4 inches square.

Q. What was Mr. Macartney doing just before he got hurt?

A. He was hooking up this case of glass up in the square, and it's, well, what we call a bridle sling, and putting the sling around the end of the tape.

Q. Then his partner was working on the other end of it? A. Yes.

Q. How long had this case on the dolly behind him been standing there before it fell off the dolly, the case?

A. Oh, it was there for several minutes.

Q. Was there anybody standing nearby that particular dolly [109] or case of glass on the dolly before it fell on Mr. Macartney? I mean except Mr. Macartney.

A. No; Mr. Macartney and his partner were the only ones that was near it.

(Testimony of Andrew J. Weber.)

Q. Was there any line or cable attached to it in any way before it fell?

A. No; there was nothing attached to it. It was resting on this dolly.

Q. All right; it was just resting there on the dolly; is that right? A. Yes.

Q. Which way was the dolly and the case of glass facing at that time before it fell?

A. Well, it was facing inshore.

Q. That would be towards the dock?

A. Yes.

Q. Parallel with the dock?

A. It was parallel with the dock.

Q. About what size would that particular case of glass be on that particular dolly which fell on Mr. Macartney?

A. It was about 4 feet high, oh, approximately 6 feet long and about 10 inches thick.

Q. Did the ends of the crate of glass stick out across each end of the dolly?

A. I believe they did, yes. [110]

Q. What particular stevedoring company furnished this dolly?

A. Well, I believe all the stevedoring companies have dollies of this type.

Q. Well, you were working at the time for which one?

A. Working for Oregon Stevedoring Company.

Q. Did they furnish this dolly that day?

A. Yes.

Q. I will ask you whether or not a short time be-

(Testimony of Andrew J. Weber.)

fore this crate of glass fell on Mr. Macartney did you happen to look out the hatch of the ship at the dock? A. Yes; I did.

Q. What did you see at that particular time when you looked out of the hatch of the ship at the dock?

A. Well, my partner and I were talking about the roll of the dock. It seemed like it was bobbing up and down. It was more or less of an optical illusion. When you are on a ship like that if the ship is moving it will seem as if the dock itself is moving.

Q. Is that the condition that you noticed before this crash occurred?

A. Yes; we noticed it as well in the other hatch, also.

Q. You were working down there in the same deck near Mr. Macartney at that time; is that right? A. Yes, sir; that is right. [111]

Q. How much approximately of an up-and-down movement did you notice on that occasion just before this happened when you looked out at the dock?

A. Well, I would say about, oh, at least a foot, perhaps two.

Q. Did you look out at the dock more than once and notice this condition before that accident occurred that day?

A. Well, yes; we commented on it several times.

Q. You mean you looked at it several times?

A. Yes.

(Testimony of Andrew J. Weber.)

Q. And it existed several times before this happened? A. Oh, yes.

Q. Mr. Weber, do you know whether or not the portion of the hatch or hold below where you were working that day was loaded or was it empty at the time this accident occurred?

A. Well, it's kind of common practice to look in the lower hold to see if there is any cargo for discharging down there, and we lifted up the hatch cover. I noticed that the hatch was empty.

Q. That was before this glass fell on Mr. Macartney that day? A. Yes.

Q. When you noticed a condition of that kind, and keeping in mind also that No. 5 hatch or hold was empty, you say, after you got the steel cargo and wire, whatever it was, out of it, [112] what effect did that have upon the ship?

A. Well, it would be more or less in a, oh, top-heavy position.

Q. What does it make the ship do?

A. Well, it would, it would have a tendency to roll alongside the dock even.

Q. Which way does it roll?

A. Well, it would roll sideways.

Q. What? A. It would roll sideways.

Q. You mean towards the dock?

A. From port to starboard.

Q. From port to starboard. Mr. Weber, did you notice whether or not the deck where you were working at the level you were working that day was sloping or not before this occurred?

(Testimony of Andrew J. Weber.)

A. Well, the ship did have a list because we were working on the offshore side, and when we rolled the dolly down, well, we had to more or less hold it back a bit to—in other words, it would more or less roll on its own, where on the other side they had to push it up to get it to the square of the hatch.

Q. Now, this list that you mentioned existing, was that before this accident happened?

A. Yes.

Q. How long had it existed before this happened?

A. Oh, I would say perhaps an hour before the accident happened. [113]

Q. What I am getting at is, was it there when you came down to start working the glass cargo?

A. Yes; the ship had a list all day, if I remember right.

Q. Oh, all day; you mean while you were working the steel cargo, too?

A. Yes.

Q. Which direction did you say this list would be?

A. Well, it was listing to port.

Q. Towards the dock?

A. Yes, towards the dock.

Q. Towards the dock; all right.

Can you tell me approximately, Mr. Weber, in the distance in making up the river side of the hatch to the square of the hatch—that would be the port side of the ship, we will say, just as a matter of roughly——

A. Oh, just the hatch?

Q. From the side of the ship on the river side

(Testimony of Andrew J. Weber.)

to the square of the hatch, how much of a list would there be?

A. Oh, that would be pretty hard to tell, maybe four or five degrees. [114]

* * *

Q. Was Mr. Macartney working on this particular operation taking the crates of glass out the same as he had done the day before on these other crates of glass; that is, take them out of the square of the hatch, he and his partner, and put one out in the square and leave another one sitting behind [116] him on the dolly?

A. Well, yes; it is common practice if you are waiting to take one load out, well, to just get another load and just stand by.

Q. Then you would go out in the front of it and hook up the gear on the one that is out there; is that right? A. Yes; that is right.

Q. Is that the usual, customary and usual practice? A. Yes; it is.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Mr. Weber, didn't you see 594 tons of cargo in the lower hold of No. 4 hatch that day before the accident, for Vancouver, B. C.?

A. Well, I don't remember of any cargo being for Vancouver. I mean, it would be—well, it would be marked Vancouver no doubt if one would look

(Testimony of Andrew J. Weber.)

at it close, and I didn't notice any Vancouver cargo.

Q. Did you take the hatchboards off of the shelter deck and look down into the lower hold?

A. It's the general practice, you know, to just lift up the hatch cover and look down to see if there was any cargo.

Q. Did you do that on this day; do you remember? [117]

A. Yes.

Q. You say there was nothing down there?

A. No. 4 hold I didn't see anything.

Q. Were there lights down there that you could see?

A. No; there was no lights.

Mr. Tatum: That is all. [118]

* * *

Mr. Conway: For St. Vincent's Hospital, Portland, Oregon, for hospitalization, \$1,131.70; Dr. Howard Cherry for services, \$621.00; \$13.00 for Buck Ambulance Service; \$174.50 for postorthopedic services; \$5.70 for Shaw Surgical Supply Company; \$43.50 for medicines and medication, making a total of \$1,989.40.

I will call Mr. Roberson. [124]

GUY I. ROBERSON

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. How long have you been longshoring here in the Portland area?

A. Oh, somewhere in the neighborhood of 18 years.

* * *

Q. Where were you working on October 10, 1954, on the day Mr. Macartney was injured?

A. I was working as a member of the deck gang, the gang that he was working in the hold.

Q. On what ship? [125]

A. In other words, I was driving winch.

Q. You were on the Wyoming? A. Yes.

Q. You were operating one of the winches on the ship that day? A. Yes.

Q. Do you recall, Mr. Roberson, the way the ship was moored to the dock on that occasion?

A. I am afraid I don't.

Q. Well, I mean what lines did she have?

A. I couldn't tell you because I don't remember.

Q. All right.

A. I didn't pay too much attention anyway.

Q. How long have you known Mr. Macartney?

A. That would be hard to say.

Q. Well, I mean approximately?

(Testimony of Guy I. Roberson.)

A. Oh, I would say maybe six or seven years.

Q. Did you have occasion to work with him from time to time before he was injured along the waterfront?

A. Yes.

Q. Can you state whether or not he was able to do a reasonably good job as longshoreman before this accident happened?

A. Yes.

Q. At different kinds of work on the waterfront?

A. Yes. [126]

Q. Down in the hold of a ship, for example, was he able to do that?

A. Well, we packed 140-pound sacks of flour together, wheat.

Q. Did he have any trouble doing that kind of work?

A. No, sir.

Q. Then what difference have you noticed in him since he got hurt on October 10, 1954, in connection with his ability to work?

A. Well, it is very obvious he walks as if he were walking on eggs. In other words, it is pretty obvious that his legs are tender because he steps very carefully, and as far as what kind of work he has been doing, I don't know. I have not seen him do any lifting of any kind since he was hurt. [127]

* * *

Q. Then did you finish unloading the glass cargo that same afternoon?

A. That I can't remember.

Q. What does it mean, Mr. Roberson, when you say that a ship is tender? What does that mean?

(Testimony of Guy I. Roberson.)

A. It means that it rocks easily.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Mr. Roberson, at the time Mr. Macartney was hurt and this lot of glass fell on him, it is a fact, isn't it, that you had no cargo on your gear at that time?

A. I believe that is correct. I believe we had—were just bringing the slings in to get another case of glass.

Q. So that the operation of your gear to that moment of his injury could not have caused any movement of the ship?

A. Not our particular gear, no.

Mr. Tatum: Thank you. That is all.

Redirect Examination

By Mr. Conway:

Q. There was another hatch or two being worked at the same time, though, weren't there? [133]

Mr. Tatum: I object to that as leading.

Q. (By Mr. Conway): State whether or not there was another hatch being worked at the same time?

A. As nearly as I can remember, there were at least one other hatch and possibly more—now, just how many gangs were on the ship I have [134] forgotten.

VIOLET MACARTNEY

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. Before Mr. Macartney was injured, from your own observation, was he able to get around pretty well on his legs and use them in the usual way?

A. Yes; I would say that while he gets along very well now [135] with his handicap, it is trifling compared to what he used to get around.

Q. That is what I mean. Before did he have any difficulty with either leg? A. No.

Q. Did he play hockey for awhile a few years back? A. Yes; for a number of years.

Q. For whom did he play?

A. Oh, he played for Portland, Seattle, Vancouver, Calgary, and the Montreal Canadiens. [136]

* * *

Q. Does he make any complaints since he got injured about any aches and pains in his legs?

A. Yes; I hear them every day. He is very nervous. He doesn't sleep well, up and down all night. After he works during the day, he usually comes home with his legs and ankles swollen.

Q. Did he have any trouble like that before he got his legs hurt? A. No. [137]

* * *

WALTER H. MACARTNEY

plaintiff herein, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Conway:

* * *

Q. What education do you have?

A. Well, just a grade school is all.

Q. Did you finish grade school? A. Yes.

Q. How old are you? A. 47.

Q. How long have you been following the occupation of [138] longshoreman here in the Portland, Oregon, area? A. I think since 1942.

Q. Are you trained or qualified to do any other kind of work besides longshoring?

A. No; I am not.

Q. When and where did you first commence to do longshoring work? A. Portland, here.

Q. What was the amount of your earnings per day as a longshoreman during the year 1954 up to and at the time you were injured on October 10, 1954?

A. For a nine-hour day it was \$22 and something. [139]

* * *

Q. (By Mr. Conway): In 1955, Mr. Macartney, after you were injured and you went back along in the summertime, whenever it was in 1955, I will ask you whether or not your earnings for that year

(Testimony of Walter H. Macartney.)

amounted to \$2,204.63 according to your income tax return for 1955? A. Yes. [140]

* * *

Q. (By Mr. Conway): Mr. Macartney, have the wages of longshoremen been raised since October, 1954, in Portland, including your own?

A. Yes; quite a bit.

Q. How much?

A. Well, on a nine-hour day it is about \$26.75. That is on straight cargo, and if you work wheat it is 20 to 30 cents an hour more.

Q. Roughly, what would that be in percentage figures? A. For like unloading wheat?

Q. Yes. A. It would run around \$29.00.

* * *

Q. At the time you were working as hold man for these several [141] years prior to October 10, 1954, as longshoreman, did you have any difficulty or discomfort with either your right or left leg in doing all kinds of your work?

A. No; I didn't.

Q. Did you have any pain or disability during these years before October 10, 1954, in either your right or left leg? A. No.

Q. Approximately what time was it on October 10, 1954, that you went to work as hold man assisting in unloading these crates of glass in the No. 4 hold on the Wyoming?

A. Well, we unloaded steel in No. 4 in the morn-

(Testimony of Walter H. Macartney.)

ing. I think it was kegs of nails and a little other general cargo.

Q. That was a different hatch, wasn't it?

A. Yes; that was No. 5.

Q. No. 5. All right, then. When did you start working on the glass?

A. We went into No. 4 right after dinner.

Q. When you say dinner, you mean noontime?

A. Yes.

Q. By whom were you employed on that occasion? A. The Oregon Stevedoring.

Q. From what part of the hold did you and your partner move these crates of glass on this dolly we were talking about yesterday?

A. From the offshore side. [142]

Q. You were working on the offshore side of the ship? A. Yes.

Q. How many of these crates of glass did you move that day before the accident took place?

A. Oh, I would say 10 or 15.

Q. How many? A. 10 or 15.

Q. Did you move all those particular crates of glass that day before this happened and use the same method of operation that you were using on the particular crate that was involved in the accident? A. Yes; we did.

Q. Tell the jury and the Court how you moved the crates of glass and what you did with them?

A. Well, we ran the dolly in in the wing, or in the aft end, and ran this dolly underneath the crate,

(Testimony of Walter H. Macartney.)

and then the gang would pull the crate back on the dolly, and then we would push it out to the hatch.

Q. How would you get the crate of glass on the dolly?

A. Well, we just—there is two little clips on the dolly, and we just ran the clips underneath and then pulled the crate of glass back on the dolly.

Q. Then the glass, the case of glass would rest on the dolly by itself? A. Yes. [143]

Q. Without being fastened?

A. That is right.

Q. Then you and your partner would do what?

A. Well, we would push it out to the hatch.

Q. Then did you put it out in the square of the hatch so that the gear could come down and pick it up? A. Yes.

* * *

Q. Mr. Macartney, what did you do when you got to the square of the hatch with the dolly and crate of glass?

A. We left it sitting there and hooked up the other load.

Q. How far behind the case in the square of the hatch did you leave the dolly sit with the case of glass on while you were waiting for the slings to come down?

A. Oh, I would say three or four feet.

Q. What did you do in connection with fastening the sling on when it came down?

A. Just hooked the sling around the two ends, and they would hoist it up. [144]

(Testimony of Walter H. Macartney.)

Q. Which way would you be facing?

A. I would be facing inshore.

Q. What would be behind you?

A. Well, it was the dolly with the glass on it.

Q. Which way would it be facing?

A. It would be facing inshore.

Q. Would it be parallel to the shore?

A. I would say so.

Q. Is that the same method of operation that you did with all these other cases you moved out before the accident happened? A. Yes.

Q. Is that the usual and customary manner of doing that operation?

A. Well, that is—I have not worked glass very much. I guess that's about the first time or so that I worked it, might have worked it once before, but, so far as I know, that is the only way they ever worked it.

Q. Would you please show him the picture of a dolly?

(Photograph presented to the witness.)

The picture you have there, Mr. Macartney, do you recognize that? A. Yes.

Q. Is that the same type of dolly which you were using that day? [145]

A. Yes, I think it is the same.

Q. Who furnished the dolly that you were moving these crates of glass out with; do you remember?

A. I imagine the Oregon Stevedoring Company.

(Testimony of Walter H. Macartney.)

Q. Who was your working partner?

A. John Raanes.

Q. When you left the dolly behind you with this crate of glass on it standing up by itself, how long was it standing there after you left it before the accident happened?

A. It was a few minutes. I couldn't say.

Q. Was there any other fellow working in the immediate vicinity of that case of glass or dolly at the time besides you and your partner?

A. Raanes was on the other end, and I was on the other end.

Q. Just you two gentlemen?

A. Well, as far as I know now.

Q. You didn't see anybody else there?

A. No.

Q. After you left this dolly and you and your partner brought it over there to the square of the hatch like you mentioned, what did you then do?

A. Well, we were waiting on the gear to come in, and when it came in we started to put the slings around the load of glass, and when we were doing that the other crate of glass come off the dolly and pinned me underneath the crate of glass. [146]

Q. Did you have any warning or hear any sound of this crate and dolly tipping over on you?

A. No; I didn't.

Q. About how far were you standing in front of it at the time it fell?

A. Of the dolly?

Q. Yes, of the dolly.

A. Oh, I would say three or four feet.

(Testimony of Walter H. Macartney.)

Q. Did you have your back to it?

A. Yes.

Q. You were facing which way?

A. Inshore.

Q. Do you know whether or not you had your hand on the case of glass that was standing in the square of the hatch?

A. Well, I just started to hook it up, I think, putting the slings around it.

Q. Then do you recall what size of crate of glass this was that fell on you?

A. Oh, I would say 7 or 8 feet long, 8 or 10 inches thick and, oh, 4 or 5½ feet high.

Q. Approximately how much would it weigh?

A. I would say 1,500 pounds.

Q. When you were moving this particular crate over to the square of the hatch, did you notice anything different about moving it over there than any of the other cases you moved [147] that day before the accident happened?

A. No; I didn't.

Q. Was it well placed on the dolly or not; do you know?

A. Well, yes; the same as the others.

Q. The same as the others?

A. Yes.

Q. About how far was it, Mr. Macartney, that you moved this dolly with this crate of glass on it that fell on you from where it had been stowed?

A. Oh, I would say approximately 20 feet, 25.

Q. Was the ship headed upstream or downstream with the dock?

A. The ship?

Q. Yes.

A. Upstream.

(Testimony of Walter H. Macartney.)

Q. What did you do after this crate of glass fell upon you?

A. Well, it kind of knocked me out a little, and I don't remember very much.

Q. Do you remember about how long you lay there?

A. Well, it wasn't very long.

Q. Did you feel any pain?

A. I beg your pardon?

Q. Did you feel any pain?

A. Yes; I had a lot of pain.

Q. Where?

A. All over me, I guess. [148]

Q. How did you get out of the ship after you were injured?

A. Well, they put a board down there, and they hoisted me out on the board.

Q. Did any of the fellows go out with you?

A. I think there was one and one fellow off the ambulance, I think, if I remember now. I wouldn't say.

Q. What did you do after you got out on the dock?

A. Well, they put me in the ambulance and rushed me to the hospital.

Q. To which hospital did you go?

A. St. Vincent's.

Q. Is there anything that you could have done yourself when you had your back to this crate of glass to avoid having it hit you?

A. Well, no; I don't think so.

Q. You say you didn't hear any sound when it fell?

A. No sound at all.

(Testimony of Walter H. Macartney.)

Q. Nobody said anything to you about it falling?

A. No.

Q. Didn't say Yes or No? A. No.

Q. What part of the crate of glass hit the back of your legs?

A. Well, it hit them right across here (indicating).

Q. When you say "here," you are talking about half way to the [149] knees from the ankles?

A. Well, it's about four inches from the ankle on both feet.

Q. What part of the crate hit you there?

A. Well, around mostly the top, I think.

Q. What was the crate of glass made of, the outside crate? A. Wood.

Q. How did they get the crate off you?

A. Well, as far as I remember, they all ran over and lifted it off.

Q. Do you know about how many men it took to lift the crate off? A. No, no; I wouldn't.

Q. Was this in the 'tween decks level where you were working at the time? A. Yes.

Q. What difference have you noticed in your legs yourself since you had this accident than your legs and the way you were before you were injured; do you remember?

A. Well, I see a big difference. I have not got any power in them, and they ache all the time, and I don't get any sleep at night. I am up four or five times a night. I have these Charlie horses in the back a lot of times.

(Testimony of Walter H. Macartney.)

Q. Speak a little louder.

A. I have these Charlie horses in the back a lot.

Q. Back of what? [150]

A. Back of my legs. I never had those before. I am up four or five times a night. I don't get any sleep.

Q. Did you have any trouble like you are talking about before this accident happened?

A. No.

Q. Did you ever have any trouble with your legs? A. No.

Q. Before this accident happened?

A. No.

Q. Were you more or less active in years gone by in playing hockey?

A. Well, I played professional hockey for fifteen years.

Q. Did you ever have any trouble with your legs while you were playing professional hockey?

A. No.

Q. Do you have any sensation in your legs when you are mowing the lawn, for example, at home?

A. Well, I mow a little, and I have to rest.

Q. What do you feel when you try to do that?

A. Well, I have not got any power in them. They swell up if I am on them a lot.

Q. What do you notice about your legs if you do a lot of working?

A. Well, my ankles swell up a lot.

Q. Do you have any pain in them? [151]

(Testimony of Walter H. Macartney.)

A. And I can only walk so far. Yes, I have pain in them a lot.

Q. State whether or not you have any ache in them and how often?

A. Well, they ache mostly at night and when I have been on them a little, and during the day they are fair; not good.

Q. Do you still have a steel rod in each one?

A. Yes.

Q. Can you feel those rods when you walk?

A. Well, just—no, I can't feel them, but I can't jump down at all on account of the rods, I guess, being in my instep, and I can't get on my knees. I don't know why that would be, but I have a sharp pain in there if I get on my knees.

Q. In connection, Mr. Macartney, with the kind of work, manual labor, that you were doing as a longshoreman at the time you were injured and before you were hurt, have you been able to do any similar type of work as that since you were hurt?

A. No; I can't.

Q. Why not?

A. Well, I have got no power in my legs.

Q. What type of longshore work are you able to do since you got hurt?

A. Well, I am what they call, I am on what they call the "old man's board." [152]

Q. What does that mean?

A. What we have usually is barges that come up from the Snake River and Umatilla and The Dalles with wheat and have a suction out at Terminal 4

(Testimony of Walter H. Macartney.)

where it is run by an electrical appliance, and it has got six rubber hoses and what we call shoes, and it comes down into the hold of the barge, and it sucks this wheat up. All we have to do is just move it when the wheat is—move it maybe a foot or so at a time until that sucks out, and in that way I am sitting down 90 per cent of the time, I would say.

Q. You have to sit down most of the time at that particular job, do you?

A. And I work for, I would say, 75 per cent of the time.

Q. In that connection, though, the loading of wheat like you mentioned, can you make as much doing that, or is the work as frequent as it is on the other type of longshore work you used to do?

A. Well, you never know. Now there has not been any in for a week. They have had these what you call dead ships, loaded 50 of those and sent them down to Astoria and bringing those back to unload the dead ships, and in that way there has not been a barge this week for six days.

Q. You have no way of knowing, then, when they are going to load wheat?

A. We have no idea at all. [153]

Q. Is it more or less seasonal?

A. Yes; it is. You may have one every day for a month, and you may not have one for a week or ten days.

Q. Are you able to do now the kind of work as a

(Testimony of Walter H. Macartney.)

hold man climbing up and down a ladder, and so forth, that you did before you were hurt?

A. Well, I have never been in the hold of a ship since I got hurt.

Q. Can you climb up and down ladders like you used to? A. No; I can't.

Q. Approximately how much have your earnings as a longshoreman been reduced as a result of these injuries?

A. Oh, I would say \$2,500, \$3,000, between that.

Q. You mean per year? A. Per year.

Q. What was the amount of your loss of earnings as a longshoreman from the time you were injured on October 10, 1954, up to the time of this trial today?

A. Oh, I would say eight or nine thousand.

Q. Eight or nine thousand dollars?

A. Yes. [154]

* * *

Q. (By Mr. Conway): Did anybody in the employ of this ship or anybody else tell you anything about the ship listing while you were working?

A. That I can't remember now.

Q. Did anybody in the employ of the ship say anything to you at all about the manner of working this particular cargo, the unloading operation or method to use for such cargo unloading?

A. No; they did not.

Q. How many times had you worked on ships unloading glass in crates before the day you were injured?

(Testimony of Walter H. Macartney.)

A. Well, I might have worked in them once before, but I am not sure on that.

Q. During the time you were working down in this No. 4 hold, [155] Mr. Macartney, unloading these crates of glass, did you see any ship's officers in the hold? A. No; I did not.

Q. Did you see any ship's officers looking over or down into the hatch to see what you were doing while you were unloading this glass?

A. No; I did not.

Q. After you were hurt did you have any occasion to look at the dolly that the crate of glass fell off? A. No; I didn't look.

Q. What kind of a floor did this deck have that you were working on?

A. It had a steel floor.

Q. Was it rough or smooth?

A. I would say it was fairly smooth.

Mr. Conway: You may inquire.

Cross-Examination

By Mr. Tatum:

Q. Isn't it a fact, Mr. Macartney, that on the day you were working down in the Wyoming that you didn't know whether the ship had a list or not?

A. Well, yes; that is right.

Mr. Tatum: That is all. [156]

(Testimony of Walter H. Macartney.)

Redirect Examination

By Mr. Conway:

Q. When you were working down in the hold that way, the way you were working, could there be a list on the ship and you not know it?

A. Oh, yes; you can't tell if there is—well, you could tell if there was a very large list, but a few degrees you can't tell down below. [157]

* * *

CHARLES W. FOSTER

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tatum:

Q. Will you state your name, please?

A. Charles Foster.

Q. Where do you live, Mr. Foster?

A. Portland.

Q. What is your occupation?

A. I am a supercargo.

Q. What in general is a supercargo?

A. A supercargo is a sort of business agent for the steamship. Years ago it was the traveling representative of the shipowner that picked cargo and handled the loading and unloading of it, but now mostly you do the cargo work and paper work and

(Testimony of Charles W. Foster.)

such work connected with the shipping business. You represent the steamship agency on the job of ship loading or unloading.

Q. You are a shore-side employee?

A. That is right.

Q. You work on different ships from time to time?

A. I do.

Q. Do you work for different companies from time to time?

A. I do. [159]

Q. Are you generally in charge of keeping the records of the loading and unloading of ships when they come into Portland or Oregon harbors?

A. That is the main part of our work, yes.

Q. Keeping records for loading and unloading?

A. That is right.

Q. In doing that, are you down on the ship during your entire shift?

A. That is right, all the time.

Q. Are you sort of an intermediary between the ship's officers and the longshormen?

A. I am sort of intermediary between the steamship uptown office, the stevedore, and the ship's officers.

Q. Were you acting as supercargo on the M. S. Wyoming when she was in Portland on October 10, 1954?

A. I was.

Q. I hand you herewith a lot of documents stapled together as Exhibit 25 for Identification. On the top there, Mr. Foster, are those the written reports made by the supercargo for the Wyoming when it was in Portland on that particular trip?

(Testimony of Charles W. Foster.)

A. Yes, they are.

Q. Do you have someone else who takes the night shift on these ships?

A. Yes, if the ship works night and day we have a night man and a day man. We change at 7:00 o'clock in the evening. [160]

Q. Were you the day man on that shift?

A. I was.

Q. Do your records which you now have before you show that you were working on October 10, 1954, as supercargo on that ship?

A. That is right.

Q. Do you have one sheet which shows the unloading from the vessel? A. Yes.

Q. Do you have another sheet which shows the loading on that particular day? A. Yes.

Q. From examining the sheet which shows the loading on October 10th, could you tell me—I mean the unloading—could you tell me what was unloaded that day?

A. Yes, we unloaded 25 ton of steel from No. 3, 50 ton of glass from No. 4, and 119 ton of steel from No. 6.

Q. Does that record also show the time that these particular shipments were being unloaded?

A. Yes, it does. We had two gangs working. One gang worked No. 3 hatch from 8:00 o'clock until 10:00 o'clock discharging steel, and then they started to loading, and the other gang started in No. 6 and worked from 8:00 o'clock until 1:45 discharg-

(Testimony of Charles W. Foster.)

ing steel. Then they shipped it to No. 4 hatch and discharged glass from 1:45 until 6:00 o'clock [161] p.m.

Q. Then at 2:00 o'clock or 2:10 p.m. on October 10th, what hatches were working unloading cargo?

A. Just one, the No. 4 hatch.

Q. Was that the hatch where the glass was?

A. That is correct.

Q. Was there any loading going on at that particular time?

A. Yes, we were loading—at 2:00 o'clock?

Q. At 2:00 o'clock in the afternoon.

A. Yes, we were loading frozen fish in No. 3 'tween deck.

Q. So at 2:00 o'clock in the afternoon on October 10th we have one gang working glass at No. 4 unloading and one gang at No. 3 loading frozen fish; is that correct? A. That is correct.

Q. Were there any other gangs of longshoremen working on that ship at that time?

A. Nowhere.

Q. Now, in loading frozen fish how heavy is the cargo?

A. Frozen fish packed for the French trade is quite light. It is put up in boxes about, oh, 2 feet deep, about 2½ feet wide, about 4 feet long, and the individual box probably weighs around 200 pounds. They usually put about five or six boxes on a board. They are quite bulky, and you do not get too much on a board. I suppose you could get up to ten on a board at the most.

(Testimony of Charles W. Foster.)

Q. Do your records show how much total frozen fish was loaded [162] on that day?

A. Yes, we didn't have very much; 24 long ton.

Q. How long did it take them to load 24 tons?

A. Well, it took them from 10:00 o'clock in the morning until 3:30 in the afternoon. That is four and a half hours and no one lost time, so it took them four and a half hours to load 24 ton, six ton and—six ton an hour about.

Mr. Tatum: I offer in evidence, that exhibit, your Honor.

The Court: Is there any objection?

Mr. Conway: No objection.

The Court: It is admitted.

(Document previously marked as Defendant's Exhibit 25 for Identification was thereupon received in evidence.)

Mr. Tatum: I ask the Bailiff to hand Mr. Foster Exhibit 23.

Q. Would you tell us what Exhibit 23 is?

A. Yes, it is a cargo plan of the motorship Wyoming as it was loaded in France for discharge on this coast.

Q. Does it show the locations of the cargo for the Pacific Coast ports on that voyage?

A. It does.

Q. Does it show Los Angeles, San Francisco, Seattle, Vancouver and Portland? [163]

A. Correct.

Q. Do you know from your records and knowl-

(Testimony of Charles W. Foster.)

edge how much of this cargo—whether the ship was destined to go to any other ports for unloading after Portland?

A. Yes; it was to go to Vancouver and Seattle.

Q. How much cargo was in the ship destined for Vancouver? A. 1,145 ton.

Q. How much was destined for Seattle?

A. 100 ton.

Q. How much was taken off here in Portland?

A. 559 ton.

Q. By examining that document, are you able to tell whether or not there was any cargo for Vancouver stowed in No. 4 hatch on this particular day?

A. Oh, yes; plenty.

Q. How much? A. 594 ton.

Q. Stowed in No. 4?

A. In No. 4 lower hold; that is right.

Q. Is that the area which was directly underneath the place where the glass was stowed?

A. That is right.

Q. Do your records show what the draft of the ship was at various times during the operations in Portland?

A. Yes, mornings and evenings, and when I start in the [164] morning I take the draft. When I quit in the evening I take the draft, and the night man takes the draft in the evening, and he takes the draft again in the morning.

Q. What does that show, the draft?

A. It shows whether your ship is going up or down in the water. It shows the displacement immersion in the water.

(Testimony of Charles W. Foster.)

Q. Does it show how far down the ship is in the water? A. Yes; that is what it is.

Q. There are marks on the bow and stern, numbers? A. That is right.

Q. That is what you read. It shows how many feet it is down? A. That is right.

Q. Does that show how fully loaded it is weight-wise? A. Yes; it does.

Q. How fully loaded was this ship when she came in, roughly?

A. Well, I don't know exactly. The ship is about, I would say, an 11,000-ton ship, and with the beam length of her that she is she would probably have a total light summer draft of around 28,000, and the daily reports will show you what draft it was the day we were working, on the 10th. In taking the draft, you take the forward draft and the after draft and divide by 2 for your mean draft, and your mean draft is your guiding factor in the depth of a ship. At this time this ship with no cargo in her, only fuel oil and water, an empty ship [165] would probably draw maybe minus one foot forward, a rough estimate, I would say 10 feet aft to keep her wheel down for propulsion, so only with fuel oil and water, empty, you would probably have a mean draft of around, oh, 7 feet, something like that. The day that this occurred, on October 10th, you had a mean draft of 18 feet and 7 inches, so the ship is a little less than half loaded, I would say.

(Testimony of Charles W. Foster.)

Q. Was it that way all the time it was in Portland?

A. Well, we didn't change it very much. We only discharged 559 ton and loaded 164 ton, so—and it takes about 60 ton—55 ton at this stage of loading to move that ship an inch.

Q. Do you know what the meaning of the word "tender ship" is? A. I certainly do.

Q. Have you been on many ships during your work as supercargo? A. Yes.

Q. Were you on the Wyoming all day the day of October 10, 1954?

A. I would not be on it every minute of the day, no, sir; on and off it. I was on the dock side or on the ship all day of the 10th.

Q. Was she a tender ship that day?

A. Negative.

Q. Why do you say that? [166]

A. Because she has no deck load at all, and she has about, I believe she must have around 5,000 tons of cargo while loading and discharging cargo, 4,000 anyway. I have no way of knowing from this, but from the draft she must have either oil, water—at least to put her down to a mean draft of 19 feet she must have around 4,000 tons of weight in her, and, that being in the bottom, your ship could not be tender. A ship like that if loaded with homogeneous cargo from the bottom upwards, your lower holds, and figuring stability in a ship, your lower holds, the double bottoms are the one page, then the strata for the 'tween deck, another strata for

(Testimony of Charles W. Foster.)

the shelter and another strata is the third. This ship had very little cargo in her upper strata. What she did have was mostly in her lower strata.

Q. Would you say the ship was very stable that day?

A. I would say she was a stable ship, yes.

Q. Working on her that day, did you observe the list of the ship?

A. No appreciable list. It would not exceed, well, I didn't observe any, but if it was over two degrees or two and a half degrees I certainly would observe it.

Q. Did you observe any unusual list that day?

A. No; I say if—a list of two degrees is not an unusual list, or a degree and a half is not an unusual list. If it is over that, it is my job to wonder why it is. [167]

Q. Did you observe any unusual working of the ship that day in the water?

A. No, sir; normal.

Q. Are you familiar with these dollies the long-shoremen use for unloading glass? A. I am.

Q. Would you show the witness the exhibit which is a photograph of the dolly.

(Exhibit presented to the witness.)

Is that the type of dolly which is used?

A. That is right.

Q. Have you seen this dolly used?

A. Many, many times.

Mr. Tatum: That is all.

(Testimony of Charles W. Foster.)

Cross-Examination

By Mr. Conway:

Q. Mr. Foster, by whom were you employed on October 10, 1954?

A. General Steamship Company.

Q. Are they the agents for the Compagnie Generale Transatlantique Corporation?

A. French Line; yes, sir.

Q. That is the proper name that I just mentioned?

A. The cargo plan is written in French, too, but I don't [168] speak it.

Q. I was not speaking French. I am asking if that was not the French Line, if that was not the proper name that I asked; is that right?

A. I worked the Wyoming, as far as I know, the name of the line is the French Line. It has always been called that by General Steamship Company. I suppose that is correct.

Q. How long have you been working in that capacity for them?

A. I worked for various employers, any steamship agent in Portland that wants to hire me if I am free, or any place else on the Pacific Coast I worked for them. I work for General Steamship mostly.

Q. What I mean is, how long before this happened had you been working for this particular agency, the General Steamship Corporation, representing this particular line?

(Testimony of Charles W. Foster.)

A. We work, in my profession we work from ship to ship, and I worked for General Steamship Company on this job from the day before the ship started. The day before the ship starts they call us to the office, and we pick up the papers and then represent them. The day after it finishes we turn in the papers, and we are ready for any other job with any other employer that may come along.

Q. In other words, General Steamship Corporation by whom you are employed represents several different steamship companies, don't they? [169]

A. Yes; they represent several steamship companies.

Q. As their agents here in Portland, Oregon?

A. That is right.

Q. This happens to be one of them?

A. That is right.

Q. How long were they representing this particular corporation before October 10, 1954?

A. I have no idea.

Q. How long have you been doing that particular work that you mentioned yourself?

A. Supercargo work?

Q. Yes.

A. Well, I studied foreign trade in college. I graduated in 1932. I have been longshoreman, checker, supercargo ever since.

Q. Since 1932? A. That is right.

Q. Do you know Pierre Canoen, who was Captain of the Wyoming on October 10, 1954?

A. I don't believe so. I probably met him. I

(Testimony of Charles W. Foster.)

have probably met the man, but I don't know him. I wouldn't know him.

Q. Did Mr. Tatum here tell you that we took his deposition on December 1st? A. No, sir.

Q. He did not? [170] A. No, sir.

Q. Do you think he would know more about what was on board the ship than maybe you did?

A. No, sir.

Q. You do not think he would?

A. No, sir. The Captain usually does not make it his work. That is the Chief Officer's work to know about where the cargo is.

Q. If he said that the ship had 1,800 ton of cargo when it came to Portland, would that be correct, according to your figures?

A. He would probably know that, yes, sir, because he reads the log.

Q. That is what I mean. So you could be mistaken about how much cargo was on it, couldn't you?

A. Yes; I could, but I would not be too far off because her drafts indicate that she is drawing 19 feet, and when the ship's maximum draft would be around 28 feet she goes down about 700 ton to the foot, so you have about 9 feet at 700 ton.

Q. Don't you have a copy of the log there with you?

A. No, sir; I never read the ship's log.

Q. Didn't Mr. Tatum give you a copy with these other documents? A. No, sir. [171]

(Testimony of Charles W. Foster.)

Q. According to your figures, how much cargo was discharged here in Portland?

A. 500 some odd tons, I think it was.

Q. How much? A. 549 ton.

Q. Then you say how much was put on?

A. 164.3.

Q. 164? A. That is right.

Q. But you do not have any figures as to how much cargo was on board the ship when she sailed?

A. No, sir.

Q. Do you know approximately the size of this particular dolly in this picture that you have seen?

A. Yes; I am quite familiar with that. I have seen them for a long time.

Q. Can you give the approximate dimensions of it?

A. I would say about 4, 4½ feet high by 6 feet long, a foot and a half to 2 feet deep.

Mr. Conway: I think that is all; thank you.

Mr. Tatum: That is all, your Honor.

(Witness excused.)

Mr. Tatum: I offer in evidence the exhibit with the chart on it. [172]

The Court: It may be admitted.

(Document, cargo plan of Motorship Wyoming, previously marked Defendant's Exhibit 23 for Identification, was received in evidence.)

Mr. Conway: May I ask him a question, your Honor?

(Testimony of Charles W. Foster.)

The Court: Yes.

(Witness Charles W. Foster was thereupon recalled for further cross-examination by Mr. Conway, as follows.)

Q. (By Mr. Conway): Mr. Foster, I forgot to ask you, and the Judge was kind enough to let me, what makes a ship list back and forth when it is in port?

A. What makes a ship list and what makes it list back and forth is two different things. What makes a ship list is inequality of the weight distributed sideways. What makes it list back and forth is normal action of a ship in water which has to move because the water is fluid and the ship is not, and if your ship is a stiff ship or heavily loaded in the lower strata you have very little movement, and if you do have it it is a quick and decisive movement because it is rocking with a lot of weight in the bottom; but if your ship is tender then when you are reaching your minimum of GM, which is geometric center of stability, your ship tends to become quite tender, and it does not take very much weight to make her go from one [173] side to the other.

Q. Well, then, this particular ship, Mr. Foster, on that occasion, that day, October 10, 1954, do you remember how she was moored at the dock?

A. She was moored normal fashion, upstream, head upstream, normal tie-up with head lines and spring lines.

(Testimony of Charles W. Foster.)

Q. How many lines did she have moored at the dock?

A. I would say she had three head lines, two spring lines, two——

Q. Explain to the Court and jury what you mean by that?

A. When a ship makes up to a dock, they moor then with large lines, Manila lines usually about 10 inches in circumference for a ship of that size to have, and they try to moor them head up because it is lot easier for the pilot to dock the ship heading into the water than it is the other way about, and you moor with an offshore head line which takes up from outside of the ship, an inshore head line which takes up from inside of the ship, and your third head line is usually left to the discretion of the Mate to take in tidal play or change it, and if you are in a tidal port and if you are in a river port it usually takes two offshore lines and one inshore line. They do the same thing aft. Then they put out what they call a spring line that goes in the opposite direction. Your head line is leading upstream. Your forward spring line leads aft, and your aft spring leads forward. That is to keep the ship [174] from surging back and forth or working.

Q. You mean back and forth up and downstream?

A. Yes. And also to keep your ship from bellying out if there is any wind.

Q. Now, then, these lines that were on the ship, each one you suggested, there would be about six, would there?

(Testimony of Charles W. Foster.)

A. There would be about eight, including the two spring lines.

Q. Two spring lines and six others?

A. That is correct.

Q. When a ship would list or dip towards the dock and it would go back—would it go back?

A. You mean if the ship is rolling at the dock side?

Q. Yes.

A. She will go back and forth the same way she comes over.

Q. Will it go clear back over on the river side the same distance on the dock side?

A. Yes; a ship with even stability, I mean a ship that has her stability will work even. If she goes two degrees one way, she will go back two degrees the other way. It is normal.

Q. In this particular situation, Mr. Foster, we have a case of glass that weighed approximately 1,500 pounds on one of these dollies that you are speaking about. Now, if there wasn't anybody pushing that crate of glass off the dolly, how would [175] it fall off?

Mr. Tatum: If your Honor please, I object to that as argumentative.

The Witness: I don't know.

Mr. Tatum: It invades the province of the jury.

The Court: Objection sustained.

Mr. Conway: All right. That is all; thank you.

Mr. Tatum: That is all, Mr. Foster; thank you.

(Witness excused.) [176]

JOHN V. LUNDSTROM

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tatum:

* * *

Q. What is your name?

A. John V. Lundstrom.

Q. What is your occupation, Mr. Lundstrom?

A. I am a gang leader now.

Q. You are a gang leader? A. Yes.

Q. Is that sometimes called a hatch boss?

A. That is right.

Q. You are a longshoreman? A. Yes.

Q. How long have you been longshoring?

A. 37 years.

Q. Were you the hatch boss of Mr. Macartney's gang the day he was hurt? A. Yes.

Q. Were you down in the hold at the time he was hurt? A. Yes.

Q. Did you see the load of glass fall on [177] him? A. No.

Q. Do you know where that load of glass was before it fell on him?

A. I couldn't tell you that because I was on the side opposite.

Q. You were over on the other side of the ship?

A. Yes.

Q. Did you see the load fall? A. No.

Q. Do you know whether the load was on a dolly or on the deck, the load that fell on Mr. Macartney?

(Testimony of John V. Lundstrom.)

A. I couldn't tell you that because I don't know.

Q. Do you remember last winter when Mr. Conway and I took the testimony of all of you long-shoremen? A. Yes.

Q. Do you remember testifying there about where the load was before it fell on Mr. Macartney?

A. No; I don't remember that. [178]

* * *

Q. Do you remember whether or not you testified at that time that the dolly—that the load had been put down on the deck instead of on a dolly? Do you remember so testifying?

A. Well, you would have to put the load on the dolly first before you set it on the deck. [179]

Q. Did you, after he wheeled it over by the square of the hatch, did you not testify that the load was put from the dolly onto the deck?

A. Well, he must have. When he left the dolly, he must have put it on the deck if he left the dolly.

Q. He must have put the load on the deck?

A. Yes.

Q. When he left the dolly unattended?

A. Yes.

Q. Why?

A. Well, I don't know what he did that for, I don't know, he had another case he had there he was going to hook that on before they sent that out.

Q. He had to set it down on the deck because it would not balance?

A. I don't know if it balanced or not. I guess he was running the dolly himself.

Q. He would have to put it down on deck because it would have been dangerous practice to leave the dolly unattended, wouldn't it?

A. Sometimes you leave them there. Sometimes you don't. It all depends on.

Q. But it is dangerous practice if he leaves it on the dolly unattended; is it not?

A. Sometimes if it don't balance I guess [180] it is.

The Court: You may ask the questions now. Read the deposition and ask if he so testified.

Q. (By Mr. Tatum): Do you remember testifying on December 7, 1956, before Mr. Conway and me and a Court Reporter, and I asked you this question:

“Q. He left the dolly?

“A. Sure; he must have put it down on the deck ahead of the dolly and went in front of it.

“Q. Because if he had not done that it would have been a dangerous practice to leave it on the dolly and go in front of it; is that it?

“A. Sure; he couldn't leave it on the dolly because it didn't balance. He had to set it down on deck to hold it.

“Q. If he had left it on the dolly—I mean he should not have left it on the dolly and came around in front of it? A. No.

“Q. He should take it off and leave it on the deck? A. Absolutely.”

Do you remember so testifying?

(Testimony of John V. Lundstrom.)

A. Well, I don't remember what all I said. I can't remember anything I said there. [181]

* * *

EDWIN C. DAVIS

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tatum:

Q. Would you state your name, please?

A. Edwin C. Davis.

Q. Where do you live, Mr. Davis?

A. 5845 Northeast 29th.

Q. What is your occupation?

A. I am President of the Oregon Stevedoring Company.

Q. How long have you been connected with the Oregon Stevedoring Company?

A. Since January, 1930.

Q. What, in general, does your company do stevedoring?

A. What was the question?

Q. What do you do as a stevedoring company?

A. It is a contract business. We contract for the loading and discharging of ships' cargoes.

Q. How long have you done the work for the French Line here in Portland?

A. Well, the Oregon Stevedore Company was doing it before I came with them and is still doing it.

(Testimony of Edwin C. Davis.)

Q. So at least during the time you have been there they have been doing the work? [186]

A. Yes, sir.

* * *

Q. (By Mr. Tatum): How long have you been in the stevedoring business altogether?

A. This is my 43rd year.

Q. Will you state whether or not it is a common cargo for the French Line ships to bring in crates of glass into Portland?

A. Yes, it is. It is not a cargo that moves in large quantities but in small quantities quite regularly.

Q. Would you explain to the jury the mechanics of your operation? What happens between the ship-owner and you and the longshoremen on how you work these jobs?

A. Well, the contract stevedore contracts with the steamship company, usually direct with the representative of the steamship company. Sometimes they delegate the authority to their agent to make a contract, and we will contract with various companies because no one company would probably keep you in [187] business. You have to have a good many of them. In your contracts you work out rates for so much a ton or in lumber for so much a thousand feet board measure, work out prices for the loading or discharging of various cargoes and proceed then under your contracts, then, and it stipulates that the stevedore will furnish the suitable and necessary gear and equipment

(Testimony of Edwin C. Davis.)

as far as stevedore gear goes to handle the job properly.

Q. When a ship like the Wyoming comes in, tell us what the mechanics are. You are notified the ship comes in. Then what do you do?

A. The agent advises us when the ship is due to arrive, also gives us a discharge list if it was for cargo to discharge or a loading list if it is just loading, or both lists if it is discharging and loading, and we in turn check up with our operating manager and decide the proper number of gangs to put on the ship, depending what cargo she has, to give her the best dispatch and get her out as quickly as possible.

Q. Do you order the longshoremen from the hiring hall?

A. We order the longshoremen, and we, usually the day before or early of the morning she starts, move the necessary gear and equipment down to the edge of the dock where that ship is going to work the cargo and have everything ready to start to work.

Q. Does the ship tell you what cargo they want taken off or [188] put on?

A. Why, they could, but, actually, we get it from the discharge list which is made out by the ship.

Q. You are told by somebody on behalf of the ship what cargo you put on and what cargo you take off; is that right? A. That is right.

Q. Then are you told by anybody on behalf of

(Testimony of Edwin C. Davis.)

the ship how you are supposed to take it off or put it on?

A. No; with very few exceptions, and that would be if there was some new commodity moving where the shipper of that cargo requests a particular care should be taken of it and state a preference as to how he would like to have it taken out. Well, then, we will do our best to comply with that, but, ordinarily, we send down the gear which in our judgment is the proper gear to be used.

Q. Who is in charge of the longshoremen for you; what position?

A. We have a man called a walking boss, and he is usually an older, experienced man that understands all types of rigging and cargo handling.

Q. Then who is next in the chain of command down to the longshoremen?

A. From that standpoint, the hatch boss.

Q. The hatch boss. Who direct the walking boss on what he should do with his gang, telling them what to do? [189]

A. The supercargo usually does that function; however, there is an unwritten law—it used to be written in the contracts, but later years it isn't—that a stevedore operates under the supervision and instruction of the Master and also of the officers. Well, that goes back to days before they had supercargoes, and those days then you did work underneath the officers of the ship.

Q. Do they tell you how to work the cargo? I

(Testimony of Edwin C. Davis.)

mean, does the Master or officer direct your men on what they should do?

A. Very seldom. They could if they wanted to.

Q. Are you acquainted with these glass dollies—show the witness the exhibit with the picture, please.

(Photograph presented to the witness.)

A. Yes; I am.

Q. Does your company own some dollies like that? A. Yes.

Q. On this job on the Wyoming did you furnish the dollies to your longshoremen who work down there? A. We did.

Q. How long have you been using dollies of that type?

A. Oh, I would say 12, 14 years we used to use them or take two-wheeled trucks, hand trucks, and that was an awkward way, and also cases of glass would get away quite often, so in inquiring around we took a pattern off of W. P. Fuller [190] Company who handle more glass, I guess, than anyone in this part of the country, and they had a type of dolly like in this picture, but they just ran around with a nice, smooth warehouse floor and don't have much trouble. Ours are made a little heavier to stand the gaff, and it is the same principal exactly as used by Fuller. We have used them and found them very satisfactory.

Q. Are those dollies regular stevedore equipment? A. Yes.

(Testimony of Edwin C. Davis.)

Q. Do the ships ever supply dollies like that to you? A. No.

Q. They are always supplied by the stevedore?

A. Yes.

Q. Are the same types of dollies being used to-day that were used 10 or 12 years ago?

A. They are.

Q. By your company? A. Yes.

Q. Have there been any recent changes in those dollies by your company?

A. Not that I know of.

Mr. Tatum: That is all. [191]

Cross-Examination

By Mr. Conway:

Q. Mr. Davis, did you have any occasion yourself to go down on the Wyoming on October 10, 1954, when she was here? A. I did not.

Q. You did not go down on the dock either at the time? A. No.

Q. So, so far as your own personal knowledge of the operation is concerned down there, you don't know anything about that, do you?

A. Only from the reports from my walking boss.

Q. That is what I say. From your own personal knowledge you do not know anything about it?

A. No.

Q. Who was your walking boss at that time?

A. I believe it was Harry Hangland.

Q. Harry Hangland? A. Yes.

(Testimony of Edwin C. Davis.)

Q. Is he here today? A. No.

Q. Do you know who the hatch boss was at that time under him?

A. In this particular hatch the time sheet shows Lundstrom.

Q. That was the gentleman who was here this morning? A. Yes. [192]

Q. Is Mr. Hangland still employed by you?

A. Yes.

Q. As a walking boss?

A. Yes; has been for many years.

Q. When did you first learn about this particular accident?

A. Oh, some time in the afternoon of that particular day that the accident occurred.

Q. How many times have you heard about cases of glass falling off these dollies?

A. I don't remember of them falling off this type of dolly. When we had the two-wheeled dollies years ago they used to get away from the boys and fall.

Q. You don't recall any falling from these?

A. Not that I recollect now, and we usually recollect it because when they fall off one of those dollies, why, they usually break a lot of glass, and that is expensive. It is plate.

Q. It is quite heavy, too, isn't it, Mr. Davis?

A. Oh, yes; plate glass is quite heavy, but the cases are—it is pretty well packed, and the case looks a lot bigger than what the actual weight of it would be.

(Testimony of Edwin C. Davis.)

Q. They are made of wood, are they, the cases?

A. Yes.

Q. How much would they weigh?

A. Various size cases; they vary. [193]

Q. Well, they start at what weight, how high; put it that way?

A. Well, we get some French glass, and those cases are small and weigh very little, but this particular case, I think the records show, was about 8 feet long and 3½ feet wide and around 10 or 12 inches thick.

Q. How much would the heaviest case of glass weigh that they move on these dollies?

A. I couldn't answer offhand without checking up the records.

Q. Well, would it be as much as a ton?

A. Oh, no; we couldn't—you couldn't handle that much on one of those dollies safely.

Q. 2,000 pounds? A. What?

Q. Could you handle 1,000 pounds?

A. I imagine you could get away with a thousand pounds all right, but it's more likely they run around 600.

Q. You think it would be dangerous to handle a case of glass weighing more than 600 pounds on this type of dolly?

A. I wouldn't say because I never tried it.

Q. Well, you just said you thought that it would be dangerous to handle one at 2,000 pounds.

A. Well, because it takes a lot of power to push 2,000 pounds even on a dolly of that type.

(Testimony of Edwin C. Davis.)

Q. Would it be dangerous to handle a case that weighs 1,500 [194] pounds on that type of dolly?

A. I don't know.

Q. That is all; thank you.

Mr. Tatum: That is all, Mr. Davis; thank you, very much. [195]

* * *

(Thereupon, the deposition of Pierre Canoen was read into the record as follows.)

DEPOSITION OF PIERRE CANOEN

"Direct Examination

By Mr. Tatum:

Q. Would you please state your name?

A. Pierre Canoen.

Q. What is your home? Where is your home, Mr. Canoen?

A. In Le Havre.

Q. Are you at present serving as Chief Officer of the MS Washington, a vessel of the French Line?

A. Yes.

Q. How long have you been serving as Chief Officer of the MS Washington?

A. 25th of June, 1956.

Q. Since the 25th of June, 1956?

A. Yes.

Q. Is the Washington a ship owned and operated by the French Line?

A. Yes.

Q. Have you served aboard any other vessels of the French Line?

A. Yes.

Q. How long have you been employed by the

(Deposition of Pierre Canoen.)

French Line? [198] A. Since 1936.

Q. Have you always been in the deck department of the ships? A. Always.

Q. How long have you been serving as an officer on French ships? A. Since '36.

Q. Do you hold a Master's license?

A. In France we have the license Captain au Long Cours, which enables you to be Master, yes.

Q. Have you ever served as Master on ships of the French Line? A. Yes.

Q. Have you ever served as Chief Officer of the MS Wyoming of the French Line? A. Yes.

Q. Is the MS Wyoming the same type of ship as the MS Washington on which you are now serving? A. Exactly.

Q. How long did you serve on the MS Wyoming as Chief Officer? A. One year.

Q. Were you serving as Chief Officer of the Wyoming when she was in Portland, Oregon, on October 8th, 1954, to October 10th, 1954? [199]

A. Yes."

Then we asked the Reporter to mark Exhibits 1, 2 and 3, photostatic copies of Pages 15, 16 and 17 of deck logbook.

"Q. (By Mr. Tatum): Before we get to these exhibits, Mr. Canoen, is the Chief Officer the man on the ship who is in charge of the cargo?

A. Yes.

Q. Do you have charge of planning where the cargo goes into your ship? A. Yes.

Q. Do you generally supervise both the loading

(Deposition of Pierre Canoen.)

and unloading of cargo? A. Yes.

Q. Do you work in supervising this through the local supercargoes? Do you carry on your supervision by working through a supercargo?

A. Yes.

Q. And so far as the longshoremen are concerned, do you work through the walking boss in unloading and loading? As cargo officer of this ship do you give orders to the longshoremen through the walking boss?

A. The foreman, yes." [200]

* * *

Afternoon Session

(At 1:25 o'clock p.m. the trial herein was resumed as follows.)

(In Chambers.)

MOTION FOR DIRECTED VERDICT

The Court: This motion is being made as if the portions of the deposition of Pierre Canoen that you have designated will be read into the record.

Mr. Tatum: All sides having rested, defendant moves for a directed verdict in its favor on the ground that there has been no substantial evidence to support any of the charges of unseaworthiness, and on the second ground that there has been no substantial evidence to support any of the grounds of negligence charged in the complaint.

The Court: I am going to take the motion for a directed verdict under advisement. As I indicated before, I am in general agreement with what you said, but in view of the Petterson case and some other cases decided by the Court of Appeals from the Ninth Circuit and the United States Supreme Court, I believe that I should let this case go to the jury at least for the purpose of getting their determination and their judgment on this case. [204]

* * *

DEPOSITION OF PIERRE CANOEN

(Continued)

“Q. What capacity was the ship loaded to when she left Portland?

A. 1,800 tons—no, no; 1,200 tons, 1,200 tons.

Q. And what is the fully loaded capacity in tons? A. 8,500 tons.”

Mr. Conway: Then going over to Page 34, please, about the third from the top question:

“Q. (By Mr. Conway): Well, according to your cargo plan on October 10th, 1954, how much cargo was on board when the ship arrived in Portland, on tons? A. 1,800 tons.

Mr. Conway: Now, he means by that that that is [205] the cargo that remained on board——

The Interpreter: ——when the ship came in Portland.

A. When the ship came to Portland they had 1,800 tons, approximately.

Q. On board? A. On board, yes.

(Deposition of Pierre Canoen.)

Q. How much did they discharge?

A. 560 tons unloading.

Q. How much did they put on?

The Interpreter: Put in?

Mr. Conway: Yes.

A. The tonnage weight is not marked on the log-book.

Q. Well, can he tell from looking at the logbook approximately how much that would weigh?

A. About 40 tons." [206]

* * *

INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury, you have now heard all the evidence and the arguments of the attorneys in this case, and it is now my privilege and my duty to lay down for you the rules of law which you are to follow in deciding the questions of fact that the Court is about to submit to you. It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the law so given to the facts as you find them in the evidence before you, without any bias, prejudice or sympathy for or against either the plaintiff or the defendant. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that stated in my instructions.

You have heard the argument of the attorneys.

As they, themselves, told you, what an attorney says, either during the course of the trial or in his argument to you or to the Court is not evidence. The attorney is not under oath, and his duty is a partisan one to his client.

The purpose of an argument to a jury is to suggest inferences and deductions which the particular attorney believes may be drawn from the evidence. While you may follow the inferences and deductions that are made to you by a particular attorney, if they seem reasonable and logical to you, you are [207] not bound to do so. Here again I want to call your attention to the fact, as has been brought out here, that this is a case that belongs to the plaintiff and to the defendant and not to the attorneys, so please bear that in mind.

The Judge of a Federal Court has the privilege of commenting upon the evidence and upon the credibility of witnesses. I shall not do so in this case because this case has been presented by two very experienced lawyers with wide experience in this type of case.

You are the sole and exclusive judges of all questions of fact and of the credibility of all witnesses, and I am going to leave the determination to you. However, I will lay down certain rules of law to govern you in your determination of the facts, and these rules are final and binding upon you, whether you agree with them or not and whether they coincide with what an attorney says or not.

You are to decide the questions that are to be propounded to you solely on the basis of the evi-

dence that has been introduced at this trial; that is, the testimony and the exhibits and the instructions of the Court. If you have acquired, or believe you have acquired, any knowledge or information concerning any issue involved in this action from any source other than the evidence, you are not to convey such information to any of the other jurors, and you are not to consider it yourself. [208]

The plaintiff, Mr. Macartney, seeks to recover for personal injuries which he claims he sustained, and which he did sustain, on or about October 10, 1954, while on the M/S Wyoming, a motorship owned and operated by the defendant.

Before I take up the theories upon which plaintiff claims he is entitled to recover and the specific items under each theory, I call your attention to the fact that the defendant was not an insurer of the safety of the plaintiff. Just because an accident happened does not mean that, under the rules of law, there is any liability upon the steamship company. In other words, the mere happening of an accident does not entitle the plaintiff to prevail in the absence of a breach of duty on the part of the defendant which caused or assisted in causing the injuries which plaintiff sustained. There are such things as unavoidable accidents—accidents which happen without the fault of anyone—and if you determine that such is the case here, then your deliberations will be at an end, and your verdict must be for the defendant even though the plaintiff was in fact injured.

The plaintiff bases his action for damages on two

separate and distinct grounds. The first claim is based upon contract and the second on negligence. However, the facts which plaintiff is required to show are substantially the same for both claims.

In Plaintiff's claimed based upon contract he asserts [209] that the motorship operated by the defendant was unseaworthy in two respects: First, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on said vessel. That is what the plaintiff contends first. Plaintiff's second contention is that the vessel was unseaworthy in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over. That is what plaintiff claims as his second ground.

I instruct you that it was the defendant's duty as the operator of said vessel to furnish plaintiff with a seaworthy vessel and safe and proper appliances in good order and condition. This duty which was imposed upon the defendant was not delegable. In other words, this duty cannot be passed on by contract, or any other method, and merely because Oregon Stevedoring Company was charged with the responsibility of loading the vessel does not relieve the defendant of its obligation to furnish a seaworthy vessel with safe and proper appliances in good order and condition. Likewise, knowledge or due diligence on the part of the defendant is immaterial insofar as seaworthiness is concerned for a ship is under an absolute duty to

furnish a seaworthy ship and appliances, but a seaworthy ship and appliances does not mean that the defendant was required to furnish a perfect ship or perfect [210] appliances, for the standard of seaworthiness is not perfection but reasonable fitness.

With reference to the first claim of unseaworthiness, in which it is claimed that the ship permitted the use of an unsafe and unseaworthy dolly, you have heard the evidence and I have already instructed you that it was the responsibility of the defendant to furnish a seaworthy ship with safe and proper appliances which were in good order and condition. You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evidence that the dolly upon which the crate of glass was placed was in an unseaworthy condition. That is the burden of the plaintiff. He must show that the dolly in question was unsafe and unseaworthy.

With reference to the claim that too much cargo was unloaded from one part of the ship, and as a result the ship was caused to lurch, careen, tilt, slant, lean and heel over, you are instructed that a test as to seaworthiness is whether in hull and gear the particular vessel was reasonably fit for the purposes of her voyage at that particular time.

Therefore, if you find from a preponderance of the evidence that the defendant breached its duty to provide a seaworthy ship and appliances and that, as a result of that breach, the plaintiff suffered

injury, then the defendant is liable to the [211] plaintiff.

The plaintiff has the burden of proof to establish this breach of duty because the law presumes that the defendant has performed all the duties incumbent upon it, and plaintiff, in order to prevail, must establish by a preponderance of the evidence that the defendant has not carried out those duties.

Preponderance of the evidence means the greater weight of the evidence. Now the greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you give the witnesses or by reason of other evidence that has been introduced.

If you find, with respect to plaintiff's claims against the defendant, that the defendant's vessel was seaworthy or that the evidence is evenly balanced or that the evidence inclines towards the contentions made by the defendant, then the plaintiff is not entitled to prevail on such claim.

Plaintiff's second ground for recovery against the defendant is based upon a claim of negligence.

Plaintiff is required under the law to specify the manner in which he claims that the defendant is at fault. I instruct you that he is bound by such specifications of negligence and must recover, if at all, on those specifications and no others. Before listing these specifications of negligence, [212] I call your attention to the fact that the defendant is a corporation, and corporations must necessarily act through their offices, agents or employees. If

you find that any officer, agent or employee of the defendant was negligent in any one or more particulars as contended by the plaintiff, then such negligence would be the negligence of the defendant corporation.

The specifications of negligence upon which plaintiff must recover, if at all, are as follows:

First, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on said vessel; and,

Second, in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over.

These specifications, as you will note, are the same specifications alleged by the plaintiff to have rendered the ship unseaworthy. He asserts that they also constitute negligence.

Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. [213]

In this connection, I instruct you that the owner or operator of a vessel is under a duty to provide safe gear and equipment and a safe working place for all stevedoring operations on board ship. But, here, again, I want to call your attention to the fact that a ship is not an insurer of the safety of all persons using its facilities and that the standard re-

quired of the defendant is not absolute safety but reasonable safety. In other words, the defendant was not required to safeguard the plaintiff against all risk and danger, but only against risk and dangers that are unreasonable. The most reasonable conduct frequently creates risks to others. If such conduct is reasonable, no negligence can be said to arise from it.

You have heard the evidence, and it will be up to you to determine whether the plaintiff has proved by a preponderance of the evidence that the defendant was guilty of negligence in either particular, using the standard of reasonable care that I have outlined for you.

The plaintiff has the burden of proving by a preponderance of the evidence the charges upon which he relies. However, it is not incumbent upon him to prove both of these specifications under either the theory of unseaworthiness or under the theory of negligence. If he has proved either one of them by a preponderance of the evidence, you will then determine whether such unseaworthiness [214] or such negligence was a proximate cause of plaintiff's accident and injury.

Proximate cause is probable cause. It is that cause which, alone, or in conjunction with other causes, produced the accident and injury. Thus, an act or omission of a person, which sets in operation some factor or other thing that brings about an injury, is held to be a proximate cause of the injury unless the causal force or operation of the act or omission has been broken by some new or inter-

vening cause prior to the injury. A cause without which a result would not have occurred is a proximate cause. This does not mean that the law recognizes only one proximate cause of an injury, consisting of one act or omission by one person. On the contrary, acts or omissions by two or more persons may operate or work concurrently either individually or together to cause an injury and in such case each is regarded in law as a proximate cause.

If you find that the plaintiff, himself, did one or more acts which were the sole cause of the accident, then you could not find that any acts of negligence on the part of the defendant or any unseaworthiness on the part of the vessel was a proximate cause of the accident and injury even though you find that the vessel was unseaworthy or the defendant negligent. Likewise, if you find that the accident resulted solely from the negligence of Oregon [215] Stevedoring Company, or any of its employees, then your verdict must be for the defendant. On the other hand, if you find that the vessel was unseaworthy or that the defendant was negligent in one or more particulars charged by the plaintiff and that such unseaworthiness or negligence was a proximate cause of the accident and injury, you will find for the plaintiff on that issue, and you will take up the other questions that I will outline for you. Is that clear? If the ship was unseaworthy and/or if the owners of the vessel were negligent in either one or both of the particulars which I have outlined for you and that negligence or unseaworthiness was responsible in whole or in part

for Mr. Macartney's accident, then you will take up the other questions that I am going to outline for you, but if, on the other hand, you find that the accident was due solely to what Mr. Macartney did himself or solely due to what the Oregon Stevedoring Company or any of its employees, including Mr. Macartney, did, then your deliberations will be at an end, and you will bring in a verdict in favor of the defendant.

Of course, if you find that the ship was unseaworthy or negligent and this negligence or unseaworthiness combined with the negligence of Mr. Macartney or the Oregon Stevedoring Company employees to cause the accident and injury, you will find your verdict in favor of Mr. Macartney.

The defendant has contended that this [216] accident was solely caused by either the negligence of the plaintiff or the negligence of the plaintiff combined with the negligence of Oregon Stevedoring Company. As to the plaintiff, the defendant alleges that the plaintiff was guilty of negligence in three particulars:

First, in leaving a crate of glass unattended upon the dolly;

Second, in standing in front of a loaded dolly; and,

Third, in failing to keep a proper lookout.

I instruct you that the defendant was required to specify the manner in which he claimed that the plaintiff himself was at fault, and you may consider those three allegations of negligence asserted by the defendant against the plaintiff, and you may

not consider any other act of negligence which you may believe plaintiff was guilty of for any purpose whatsoever.

On the claim of negligence made by the defendant against the plaintiff, the defendant has the burden of proof on these three issues.

As I have told you before, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. This standard of care is applicable both to the ship and to the plaintiff, and it is also applicable to the employees of Oregon [217] Stevedoring Company. In other words, if the plaintiff himself failed to conduct himself in accordance with that standard, he would be guilty of negligence. With reference to the first two specifications of negligence asserted by the defendant against the plaintiff; namely, that the plaintiff left a crate of glass unattended upon the dolly, and that he stood in front of a loaded dolly; you have heard the evidence and it will be up to you to determine whether the defendant has proved that the plaintiff himself was guilty of negligence.

In other words, the question is did the plaintiff himself act as a reasonably prudent person would have acted under the same or similar circumstances in leaving the crate of glass on this dolly unattended and in standing in front of this dolly with this load of glass. With reference to the third speci-

fication of negligence; namely, that he failed to keep a proper lookout, I instruct you that every person who is in full enjoyment of his faculties of seeing and hearing is required to make reasonable use of all of his senses and to maintain a proper lookout with a view to the discovery of perils by which he may be menaced and their avoidance after they have been ascertained.

If you find by a preponderance of the evidence that the plaintiff did not maintain such a lookout, then he would be guilty of negligence. If such negligence was the [218] sole cause of the accident, plaintiff could not recover and your deliberations will, therefore, be at an end, and you will return a verdict in favor of the defendant. If, however, such negligence, if any, merely contributed to the accident, then plaintiff would be entitled to recover, provided the defendant was likewise guilty of negligence or the ship was unseaworthy and such negligence or unseaworthiness contributed to the accident.

As an additional defense, defendant asserts that the accident-injury suffered by the plaintiff was due to the negligence of the plaintiff's fellow longshoremen in that they failed to attend the crate of glass upon the dolly and in bringing a loaded dolly into the position where other operations were being conducted.

Now, with reference to the negligence of fellow longshoremen, I instruct you that the standard is the same for them as for anyone else, and if they did something which a person of ordinary prudence

would not have done under the same or similar circumstances or if they failed to do something that a person of ordinary prudence would have done under the same or similar circumstances, they would be guilty of negligence. However, the only way the negligence of plaintiff's fellow workers could affect plaintiff is that if you find that their negligence was the sole and proximate cause of the accident. If you find that the ship was unseaworthy or the [219] owners of the vessel were negligent and if you also find that the employees of Oregon Stevedoring Company, other than the plaintiff, were likewise negligent, and the negligence of each caused or contributed to the accident, then plaintiff is entitled to recover. This is true because the negligence of plaintiff's servants may not be imputed to the plaintiff, and this would also even be applicable even if you find that the plaintiff itself was guilty of some negligence because in order for the company to avoid liability for plaintiff's negligence, plaintiff's negligence must be the sole cause of the accident.

I think this is an appropriate place to tell you that I am going to ask you to answer a couple of questions. The first question is: Was the dolly dangerous and unsafe? I am going to use the word, instead of "dangerous," I am going to say "unseaworthy." I am going to use the words: Was the dolly unseaworthy or unsafe? Will you please answer that Yes or No?

The second question I am going to ask you is: Was the Motorship Wyoming caused to lurch,

careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time? You will answer that Yes or No.

I want the foreman, whoever he or she may be, to be sure that in addition to the general verdict that this [220] special verdict be answered, and on these questions the answers must be unanimous. In other words, it must represent the unanimous opinion of each juror.

If you find, under the instructions that I have already given you, the plaintiff is entitled to recover, you will consider the question of damages. The fact that I am instructing you on the question of damages does not mean that I am or am not of the opinion that plaintiff is entitled to recover in this case because on that issue, while I am expressing no opinion one way or the other, I am going to leave it up to you to determine.

Damages, like every other proposition, must be proved by a preponderance of the evidence on the part of the person having the burden of proof, and the plaintiff on that issue has the burden of proof. In assessing damages, you should take into consideration the injuries which the plaintiff has sustained, the pain and suffering which he has endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should take into consideration any permanent disability which plaintiff has sustained as shown by the evidence, any loss of power in performing labor, any impairment of the

ability to earn money considering his position and station in life—and, generally, Ladies and Gentlemen, you should give him such amount as, under the evidence in this [221] case, will reasonably compensate plaintiff for pain and suffering and injuries past, present and future.

Plaintiff contends that he has been permanently injured, and I think that the evidence is clear that he has sustained permanent injury and disability. If you find in favor of the plaintiff in this case, you can take into consideration his life expectancy. Plaintiff is 45 years of age, and, under the standard mortality tables, he has a life expectancy of 24.54 years. That is about 24½ years. The fact that he has this life expectancy does not mean that he will live that long, or that he will not live longer. Neither does it mean that he will be employed and earning during this entire period. However, it is one factor that you can take into consideration along with evidence of his age, sex, health, habits, and the nature of his occupation, to determine what his actual life expectancy will be. You will then take into consideration whether plaintiff's injuries permanently affect his ability to work or follow his occupation.

He claims that as a result of his injuries he has lost \$8,000 in wages to date, and in the event you find in favor of plaintiff you may allow him such sum as has been proved by the evidence, not exceeding the sum of \$8,000.

He claims that he has spent \$1,989.04 for the reasonable value of medical and hospital expenses.

If you find for him, he would be entitled to that amount as well. [222]

Your decision with reference to the amount of damages must be reached and founded upon an unprejudiced consideration of all the facts and without any sympathy, prejudice or desire to punish anyone, and without any thought of plaintiff's financial condition or the defendant's ability to pay.

If you find that plaintiff, although entitled to recover, was guilty of some act of negligence which contributed to the accident, then you will reduce the amount of damages which you found in proportion to the negligence of the respective parties. For example, if you find that the plaintiff was contributorily negligent and that such negligence was responsible for 25 per cent of his accident and injuries, then you will reduce the amount of damages by 25 per cent, and you will award plaintiff 75 per cent of the recovery which you would have given him if he, himself, had not been guilty of negligence. Now this 25 per cent figure is just by way of example. If you find he was 50 per cent contributorily negligent, you would cut the damages in half. You would first find out what he would be entitled to if no negligence occurred on his part, and if he was 50 per cent negligent you would cut that award in half. If he was 25 per cent negligent you would give him three-quarters. If he was 75 per cent negligent you would only give him one-quarter. That is the way you do that. The amount of damages [223] which you put in the verdict is the amount plaintiff has and will sustain after the reduction, if any, and

that will be the amount of your verdict. You do not put a full amount in the verdict if you find that he is guilty of contributory negligence. You put in an amount after the deduction, if any.

This case is not to be decided on any basis of sympathy, passion or prejudice. You must be guided solely by the evidence and by the rules that I have laid down for you.

You are the sole and exclusive judges of the facts and the credibility of all witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case. Every witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given or by contradictory evidence. If you find that any witness has testified falsely in one material part of his testimony, you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false, you will be [224] at liberty to disregard all the testimony given by such witness unless corroborated by evidence which you do believe.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if

true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eyewitness, that is direct evidence, and you have that type of evidence in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself conclusively establish the fact, but affords an inference or presumption of its existence. You have that kind of evidence in the X-rays and in the exhibits that have been introduced in evidence. Indirect evidence sometimes may be stronger on account of the inferences that may be drawn from it than the testimony of eyewitnesses.

I think I have already instructed you on what a quotient verdict is. You cannot arrive at your verdict by any mechanical means. That means you cannot, if you decide in favor of the plaintiff, you cannot say, "Now, let's have a simple way of arriving at this verdict. Each of us will put down the amount he or she believes the plaintiff is entitled to and we will add it up, and we will get a certain figure, and then we will divide it by 12 and agree that that [225] will be the amount of the verdict." You cannot do that. On the question of damages, just like the question of liability, you must agree unanimously.

When you go into the jury room you will have an opportunity to talk the matter over, and I hope you will discuss each phase of this case, and I hope that you will be able to agree on all the questions and all the answers, but that does not mean that I am

instructing you to agree. I am telling you if you can possibly do that without violence to your conscience and your oath as jurors, and I hope you come out with a verdict.

In addition to the two interrogatories that I submitted to you, I am going to submit two forms of verdict. One verdict reads, "We, the jury, duly empaneled and sworn to try the above-entitled cause, find our verdict in favor of plaintiff and against the defendant and assess damages in the amount of blank dollars." In this blank space you will put the amount that you find plaintiff is entitled to after the reduction for contributory negligence, if any. If, on the other hand, you find in favor of defendant, you will use the verdict which says, "We, the jury, being duly sworn to try the above-entitled cause, do find our verdict in favor of defendant." Either verdict must be signed by the foreman. The foreman alone signs the verdict in this court, but I want to admonish the foreman, whoever he or she may be, to make [226] sure that the verdict represents the unanimous opinion of all of the jurors. Before I submit the case to you, there is a legal matter which I would like to take up with Counsel in chambers.

(Thereupon, the following proceedings were had in the Court's chambers.)

PLAINTIFF'S EXCEPTIONS
TO COURT'S INSTRUCTIONS

Mr. Conway: Your Honor, I think that maybe the Court overlooked the matter of instructing in connection with the amount of damage or the theory of damage involved here because, as I get the impression from your instructions, you spoke about \$8,000 as the money that the plaintiff lost up to the time of trial, and you had \$1,989.04, whatever it was, also hospital and doctor bills and what have you, and then I didn't hear you say anything about his future loss of earnings or how much damages the jury could allow him if they thought he was entitled to damages. I think we were suing for \$85,000 for general damages, for example, and then we had about \$8,000 special——

The Court: I said, "In assessing damages, you should take into consideration the injuries which plaintiff has sustained, the pain and suffering which he has endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should also take into account any permanent disability which the plaintiff has sustained as shown by the evidence, and any [227] loss of power in performing labor, any impairment of the ability to earn money, considering his position and station in life—and generally, ladies and gentlemen, you should give him such amount as, under the evidence in this case, will reasonably compensate plaintiff for pain and suffering and injuries past, present and future."

Mr. Conway: Yes, that is right, Judge, but the though I had in mind was this: I do not want you to misunderstand me. The jury might get the impression when you do not mention any sum there in that connection that they would have to find, for example, say for \$10,000.

The Court: I will take care of that.

Mr. Conway: Because they might say——

The Court: I will tell them.

Mr. Conway: You didn't say anything about No. 2.

The Court: Did what?

Mr. Conway: Say anything about the dolly.

The Court: What is that?

Mr. Conway: He has got No. 2 request here. I don't think you gave it, but I just want to make sure, "If you find the dolly being used by plaintiff at the time furnished by his employer, Oregon Stevedoring——

The Court: I did not give that.

Mr. Conway: I just wanted to make sure you didn't.

The Court: No. [228]

Mr. Conway: Okeh. I think that I made a request here in my requested instruction No. 7, your Honor, in this instruction that I took out of this case of Talbot vs. Hahn.

The Court: What is the instruction?

Mr. Conway: I didn't think you gave all that instruction there.

The Court: Mr. Conway, I didn't give any instruction which you have requested. except one little

portion, because these are the instructions I have been giving in many cases that I hear, and I didn't redraft all of them.

Mr. Conway: I understand, your Honor, but I just call that to your attention.

The Court: Is there anything which you think I should have instructed but didn't?

Mr. Conway: Well, it was in connection with this unseaworthy problem we have here. The problem I had in mind, Judge, is that a duty extended to Mr. Macartney who was on board the Wyoming with the consent of the defendant corporation who was engaged in loading crates of glass, if the ship was obligated in the exercise of reasonable care——

The Court: I covered that in the main.

Mr. Conway: That is all.

DEFENDANT'S EXCEPTIONS TO COURT'S INSTRUCTIONS

Mr. Tatum: Defendant objects or takes exception to the Court's failure to give Requested Instruction No. 1, which was for a directed verdict, and Requested Instruction 2, which had [229] to do with the dolly being the responsibility of the stevedore and not of the ship.

I also except to the Court's instruction that it was the ship's obligation to prepare safe and proper appliances in good order and condition to have a seaworthy ship, insofar as that instruction applies to the dolly, in that it is the defendant's contention that the dolly is not a part of the ship's gear to be

considered as a safe and proper appliance to become seaworthy. I further except to the Court's instruction that the defendant would be negligent in permitting the use of this dolly in that it is my understanding of the Petterson case that it applied only to seaworthiness and not to negligence.

The Court: Before the Petterson case I would never have instructed the way I have today, and early this morning I came down, and I read the Petterson case again. I came to the conclusion that I would have to restrict the reach of that decision by granting your requests, and therefore I have instructed the way I have because I think it is in line with the Petterson case.

Now you have raised the question of unseaworthiness as opposed to negligence, and I think that that is a distinction without a difference myself, and I am going to deny your request unless Mr. Conway thinks that I should grant it and only limit it to unseaworthiness. [230]

(Discussion off the record.)

The Court: Mr. Conway, earlier I asked you specifically whether you wanted to rely on both negligence and unseaworthiness, and that was the basis for my concern, but you answered that you wanted—you had both of them in your complaint and pre-trial order, and you wanted them both. That is why I gave them. Usually the plaintiff's attorneys waive one of these.

Mr. Conway: You are talking now about the dolly; is that right, Judge?

The Court: I am talking about the two theories instead of one theory, and I am also talking about the dolly in particular, that I thought it would be an easier way to submit this case, to have it submitted solely on the theory of unseaworthiness or solely on the theory of negligence, and I asked you specifically what you wanted to do, but I cannot change it now.

Mr. Conway: No, I think the way it is now we will just let it go as is. I am not going to change my position at this stage of the game.

(Thereupon the following proceedings were had before the jury in open court:)

The Court: I want to call your attention once again to the verdicts.

If you find in favor of plaintiff, you will put in that blank space the amount of damages to which you believe [231] plaintiff is entitled, and in that figure you would put in the special and general damages. In other words, you cannot allow more than \$8,000 for loss of wages and more than \$1,989.04 for medical expenses. That is for the special damages. In addition to that amount, of course, you would allow him such sum as you believe plaintiff is entitled to for the pain and suffering and the injuries which he has sustained and about which I instructed you at considerable length. In that one figure you take into consideration the general damages as well as the special damages, and then you reduce it by the amount which you find plaintiff has been guilty of contributory negligence.

On the other hand, if you find for defendant, you would use the other form of verdict.

Swear the Bailiff.

(Bailiff sworn.)

The Court: You will retire and deliberate.

(Thereupon, at 3:00 p.m., the jury retired for deliberation.) [232]

TRANSCRIPT OF ADDITIONAL INSTRUCTIONS TO THE JURY

(The jury having been duly instructed by the Court in the above-entitled cause, and having retired at 3:00 p.m. for deliberation on their verdict and returning to the courtroom at 6:00 p.m., the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I understand the jury is in disagreement. Who is the foreman?

Mr. Herman J. Foeller: I am, your Honor.

The Court: Is it correct that the jury is in disagreement?

Mr. Foeller: That is correct.

The Court: Is there any instruction I gave that was not clear and which you would like to have repeated?

Mr. Foeller: I think the instruction if you find negligence in the hold of the ship where it is imputed on down to the steamship itself, if that is clarified we could reach a decision. We are a little confused that there may have been some negligence

down there by the employes, and the opinion is that because they were a stevedoring company and so on, down to the French Line itself.

The Court: Let me just say this to you, and what I am going to say now must be considered in the light of the instructions which I previously gave you. Ordinarily, I do not like to give one instruction because it lays greater emphasis on it, but I think what I said before and what I repeat now is the test of what a reasonable person would have done under the same or similar circumstances. In other words, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

There are two grounds upon which the plaintiff claims that the ship was at fault: One, in permitting to be used and in using a dangerous, unsafe, and unseaworthy dolly or hand truck as part of the regular gear, appliances, or equipment used on the vessel.

In other words, in order to find for plaintiff you have to first find that this dolly was unsafe and unseaworthy, or, in the alternative, if you find that the ship caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean and heel over. In order to find for plaintiff you have to find that one of these two things which were proved by

the plaintiff caused or participated in causing the accident.

If the acts of the employes of the Oregon Stevedoring Company were solely responsible for the accident, or if the plaintiff himself did something, one or more things, for instance, failing to keep a proper lookout or leaving the dolly unattended with the glass on it, if you find that that is solely the cause of the accident, then you would return a verdict in favor of the ship.

You would return a verdict in favor of Mr. Macartney, the plaintiff, if you found that the dolly was defective or if the ship was leaning, and as a result of that he suffered this accident.

It is also true that if the ship was negligent and if Mr. Macartney was negligent and the negligence of both combined to cause the accident, then you would allow plaintiff to recover, but you would reduce the damages.

Has that helped you any?

Mr. Foeller: It has helped me some.

Mr. Keswick: It has helped me plenty.

The Court: I want to suggest a few thoughts which you may consider in your deliberations along with all the evidence and all the instructions which I previously gave you.

I know that you have been deliberating now for some time. This is an important case, and the trial, while it has not been long, it has been expensive for both sides, and if you fail to agree upon a verdict the case is left open and undecided. Like all cases, it must be decided sometime, and there appears no

reason to believe that the case can again be better tried or more exhaustively tried. As I told you, the case was presented by two very competent lawyers, both of whom knew their business. Any future jury must be selected in the same manner and from the same source as you have been chosen so there appears no reason to believe that the case would be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it or that clearer evidence can be produced on behalf of either side.

Of course, these matters suggest themselves, upon brief reflection, to all of us who have sat throughout this trial. The only reason I mention them is because some of them may have escaped your attention because you may not have been devoting your time to a review of the evidence and the law.

I think I told you before that I do not expect anyone to surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or solely for the purpose of returning a verdict. I do not think a person should do that; however, I think I told you just before the conclusion of my remarks that it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors, and in the course of your deliberations you should not hesitate to change your opinion when convinced that it is erro-

neous. In order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to, and regard for the opinions of the other jurors. That is to say, in conferring together each of you should pay due attention and respect to the views of others and listen to each other's arguments with a disposition to re-examine your own views. If much the greater number of you are for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict.

On the other hand, if a majority or even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt.

I think that while one juror, if he is convinced that all the rest of them are wrong, may hold out, and should, but the greater the number who are on one side, the more those dissenting jurors should re-examine their views to see whether there is a ra-

tional basis for the opinion which they hold when other jurors or so many other jurors are of the contrary opinion. I think in other cases I have told you, those of you who have served, that you are not partisans. You are judges, judges of the facts, and your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive judges of the credibility of all witnesses and the weight and effect of evidence, and in the performance of this high duty of jurors you are at liberty to disregard all comments of the judge as well as the attorneys, including, of course, the remarks which I am now making.

I hope you will remember that no juror is expected to yield the conscientious conviction which he or she may have as to the weight or effect of evidence, but remember also that after a full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

It is 6:15. If you want to go back and deliberate now, that is fine. If you want to go out for dinner, that is perfectly all right, and you can then deliberate later. I am not trying to rush you. You can deliberate as leisurely as you want. I am hopeful that you can arrive at a judgment if you can do so without violation of your individual conscience, but again I want to say that I am going to leave it up to you.

What do you want to do about it?

Mr. Foeller: We will go back upstairs.

The Court: Is there any question, Mr. Kniss?

Mr. Kniss: Yes, your Honor. If I understood you properly now, it is a decision that even though we find the plaintiff—what do I want to say here—negligent and the steamship both negligent to some degree, we still can allow damages or some of that?

The Court: That is right. If you find that the steamship company did something they should not have done or failed to do something they should have done, you can find for plaintiff even though you find that the plaintiff did something he should not have done, and under those circumstances you apportion the damages.

Mr. Kniss: That is right.

The Court: But if you find that the stevedoring company was solely responsible for the accident or if you find that the plaintiff was solely responsible for the accident, you may not return a verdict in favor of the plaintiff. If you find, however, that the steamship company did something that it should not have done and what it did caused the plaintiff's accident and the plaintiff was free from negligence, then you give the plaintiff the full amount of damages. Do I make myself clear on that?

Mr. Kniss: I think that is the main point that was holding us up.

Mr. Christal: There are only two points we can judge on; that is, the equipment and the rocking of the boat?

The Court: That is all. You cannot consider anything else. I just want to answer your questions. You can only consider those two things that the

plaintiff has specified. You cannot consider any other ground of negligence not raised, that I did not instruct you on, even though you think that the company was negligent in that respect or even though you might think that the plaintiff was negligent in some respect not designated. Mrs. Hraby?

Mrs. Hraby: Could you please give us a definition of the word "defective."

The Court: "Defective" in this instance would be a piece of equipment which a reasonably prudent person would not have maintained. It does not have to be a perfect piece of equipment. I think I explained that to you. The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances.

(Thereupon, the jury retired for further deliberation.)

Certified to be a true and correct transcript of said additional instructions to the jury.

July 16, 1957.

/s/ GORDON R. GRIFFITHS,
Court Reporter.

[Endorsed]: Filed July 15, 1957.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS ON MOTION OF PLAINTIFF TO PROSECUTE APPEAL IN FORMA PAUPERIS

Mr. Conway: If the Court please, in the matter of this case of Macartney vs. Compagnie Generale Transatlantique, Civil No. 8512, at this time, your Honor, we have a motion of the plaintiff before the Court for an order that he be permitted to appeal, to prosecute the appeal in this case on the judgment entered on April 24, 1957, to the United States Court of Appeals for the Ninth Circuit under the provisions of Title 28, Section 1915, United States Code Annotated, without prepayment of fees and costs or security therefor, as plaintiff is unable to pay same.

The Court: I notice, Mr. Conway, that the only thing you have is a conclusion that you are unable to pay the same. As I recall the testimony, he was earning around \$400 a month. His wife was employed, and he owned his own home. He had a car.

In all the other affidavits that I have seen, the people who attempt to appeal in forma pauperis have set out their assets and their liabilities so that the Court can determine whether they are in a position to pay their own costs. I notice you have not done it.

Another thing, you mention the fact he is 48 years old, married, with three children. As I recall the testimony, none of those children were depend-

ent upon him for support, and the same thing is true with the fact that you say he has approximately nineteen hundred dollars medical and hospital [2*] bills. The insurance company, I thought, was paying that. If I understand these cases correctly, he is not the only one involved. There is an insurance company which would participate in any award that is granted. Isn't that true?

Mr. Conway: Your Honor, I might suggest for your consideration that I have been practicing law here in Portland for twenty-five years, and I never had one of these proceedings before. I left this affidavit with Mrs. Mundorff several days ago. When I called her I said I don't know anything about this. I wanted to find out if that is all right.

The Court: Mrs. Mundorff said that you asked that this be turned over to Judge McColloch.

Mr. Conway: I wanted to find out, your Honor, what to do, if it was okeh. I am just explaining to you my situation because I never had one, your Honor, and so I did that. Then she said she talked to you because the Judge said that you had to determine it because you were the trial judge. I looked in the statute, your Honor, and it says "affidavit." That is the reason I made an affidavit, and then I did that. I tried to follow the statute. There is a lot of things about these proceedings, your Honor, that I don't know, and I will confess my ignorance.

As I say, it is the first time I have ever had one in twenty-five years of practice. All I ever did was

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

follow the statute. His wife tells me they have got a duplex that [3] has got a \$17,000 mortgage on it where they live, and the nineteen hundred dollars we are talking about, it is true that if he recovers in this case, the only cash—he has got to pay that back to the insurance company on the Harbor Workers Act. That is what he has got.

Now, then, as far as ability to pay is concerned, you have got the income tax returns made out which show he was making about twenty-five hundred dollars for the last couple of years there by the time when he got walking again, and his wife was working down here in a beauty salon. As your Honor knows, it costs several hundred dollars to appeal one of these cases. That is the problem, your Honor. I am just being frank with you.

The Court: I think you ought to set out with particularity what he has. The cases seem to indicate that you must do that because the affidavit must be sufficient upon which to predicate a perjury charge if it is found to be false; therefore, I believe that you should set out what assets he has and what income he has had and what his present income is certainly from the first of the year. You should set that out because otherwise the affidavit is merely a conclusion.

You have a lot of material in here that is absolutely irrelevant, and yet on the real issue you just have four or five words. [4]

I want to say also with reference to the main issue that I was surprised when I made a check and learned that you and Mr. Tatum did not waive

your presence here at the time the supplemental instructions were given. I was in error. I was under the impression that you had; but I subsequently learned that the waiver referred to your presence at the time of receiving the verdict and not to the giving of the additional instructions. However, I have looked over the instructions, and I cannot see anything erroneous about them. In fact, I thought that in one particular they were probably more beneficial to you than that to which you were entitled.

All this is in addition to the fact that throughout the trial I indicated to you that I could not see where there was any negligence. I know that I told you that at the end of the plaintiff's case in chief and again when the case was completed. I believe I indicated to you, but, if I didn't, I intended to tell you that if you did get a verdict I would set it aside on the ground that there was no evidence of negligence whatsoever on either of the two grounds that you alleged. In view of that fact, I am not in a position to certify that this appeal has any merit, and under no circumstances would I order the Government to pay the costs of a transcript and record on appeal. In view of my strong belief about the lack of merit of your case, I cannot see how I could do [5] that.

As far as the first part of it is concerned on the prepayment of costs, that is a little different category, and if you will get a proper affidavit showing that the man actually is a pauper and not in a posi-

tion to pay these costs I will grant that portion of your motion.

Mr. Conway: You see, your Honor, he is a little bit fearful of the future and his inability to earn a living in view of this unfortunate injury he has, and that bothers him quite a bit.

I was going to suggest that the Petterson case we had a few years ago went up in Seattle where the block that was brought on board by the stevedoring company broke, the way that opinion reads, your Honor, it indicates that when that happens the ship would be unseaworthy as a matter of law.

The Court: Mr. Conway, I instructed the jury on the basis of the Petterson case.

Mr. Conway: I am not questioning that, your Honor. I am trying to bring up something, if you will just bear with me a moment; what I was getting at was this: If that is true with a broken block being unseaworthy as a matter of law, which the Court of Appeals has practically held, as I understand from reading it, what is the difference between a dolly tipping over and being unseaworthy because it tips [6] over? I might be wrong, your Honor. I understand how you feel, but I am just drawing it to your attention.

The Court: I think if you want to file a new affidavit and set out his income and what his earnings have been, and I think that his wife's earnings also should go in there, and if it develops that he is not in a position to pay costs I will grant the first portion of your motion unless there is some reason why I should not. I have not heard from Mr. Tatum.

Do you agree? You have handled these cases. I think you were in the Gillis case where I did the same thing. I did not order the transcript, but I was of the opinion that an order should be entered relieving them of the duty of prepaying costs.

Mr. Tatum: I believe that is correct, your Honor. I came up with Mr. Conway this morning, and I told him I would not oppose any motion he might wish to make. I am not concurring in it, but if he makes his case that is up to him to make his deal.

(Discussion between counsel off the record.)

Mr. Conway: Well, Mr. Tatum says it was a nominal cost and the stenographic transcript and the cost of printing.

The Court: That is right. I do not know what the costs would run.

As the record now stands, I am going to deny [7] the request with leave to file an amended affidavit.

Mr. Conway: You want prepared and filed an amended affidavit, and do you want another motion?

The Court: No; I think you can improve the affidavit setting out these various items of assets and liabilities and income, and if on the basis of that it indicates that they are not in a position to pay and they are entitled to waive the requirements for prepayment of costs, I will do it, but I think it should be a complete affidavit of their assets and liabilities.

Mr. Conway: As a matter of information, your Honor, you are only talking about prepaying the filing fees?

The Court: Yes.

Mr. Conway: Not the stenographic transcript or printing?

The Court: No; I would not grant that.

Mr. Conway: You would not make that kind of an order anyhow?

The Court: That is right.

Mr. Conway: And the other one, I suppose, would be less than a hundred dollars from what Mr. Tatum says.

The Court: I do not know.

Mr. Conway: I think most anybody can raise that. That is what I understood, and I didn't want to take up the Court's time with something that involved less than a hundred dollars. [8]

The Court: I have not any idea of what that would cost.

Mr. Conway: I am just being frank with the Court. I didn't want to take your time and Counsel's time with something less than a hundred dollars.

(Hearing concluded.)

Certified to be a true and accurate transcript of all proceedings had at the time and place mentioned in the caption, in the above cause.

/s/ GORDON R. GRIFFITHS.

[Endorsed]: Filed August 22, 1957. [9]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer, Pretrial Order; Plaintiff's Requested Instructions; Defendant's Requested Instructions; Interrogatories; Verdict; Judgment Order; Notice of Appeal; Bond for Costs on Appeal; Designation of Record on Appeal; Statement of Points on Appeal; Order Extending Time to Docket Appeal; Supplemental Designation of Record on Appeal; Order for Transmittal of Exhibits to Court of Appeals and Transcript of Docket Entries constitute the record on appeal from a judgment of said court in a cause therein, numbered Civil 8512, in which Walter Herbert Macartney is the plaintiff and appellant and *Compagnie Generale Transatlantique*, a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings and testimony of April 23, 24, 1957, and transcript of additional instructions to the jury. Plaintiff's Exhibits

3-A and -B; 27 and 7-A to -F, inclusive, and Defendant's Exhibits 6-A and -B and 23 are being forwarded under separate cover. Transcript of May 21, 1957, to be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 8th day of August, 1957.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15664. United States Court of Appeals for the Ninth Circuit. Walter Herbert Macartney, Appellant, vs. Compagnie Generale Transatlantique, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 9, 1957.

Docketed: August 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 15664

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTI-
QUE, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL

To: The above-named defendant, Compagnie Gen-
erale Transatlantique, a corporation, and to
Wood, Matthiessen, Wood and Tatum and
Lofton L. Tatum, your attorneys:

You and each of you will please take notice that
the said appellant, Walter Herbert Macartney,
hereby adopts as his points on appeal the following
Statement of Points on Appeal, to wit:

1. That the trial court erred in giving supple-
mentary instructions to the jury after the jury had
been out approximately three hours and could not
agree on a verdict, which supplementary instruc-
tions were given in the absence of the parties and
their respective attorneys who were not notified of
such proceedings, and without affording them an

opportunity to be present, and to make any objections to any portions of such supplementary instructions.

2. That in connection with such supplementary instructions, the trial court erred in emphasizing and restating certain portions of the court's former instructions favorable to the appellee as to the non-liability of the appellee in this cause.

3. That the trial court erred in failing to instruct the jury correctly as to the amount and measure of damages involved in this case, as requested by appellant in his requested instruction number VIII.

4. That the trial court erred in his supplemental instructions to the jury by instructing the jury to the effect they should be convinced and decide beyond a reasonable doubt which is confusing and conflicting with his original instructions which he gave upon the theory of preponderance of the evidence, and puts a greater burden upon appellant than the law requires.

5-a. That the trial court erred in his supplemental instructions to the jury by incorrectly stating the law as to the test of seaworthiness by instructing as follows:

“The test of seaworthiness is not perfection, but what a reasonably prudent person would have done under all the circumstances.”

b. Such instruction is also confusing and conflicting with the Court's original instructions which

he gave regarding seaworthiness and a test for seaworthiness.

* * *

Dated at Portland, Oregon, this 13th day of August, 1957.

/s/ JOHN F. CONWAY,
Attorney for Plaintiff-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 15, 1957.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the respective parties hereto, appearing by their undersigned attorneys, that all of the original exhibits in this case need not be printed, but may be considered by the appellant court in their original form.

Dated at Portland, Oregon, August 13, 1957.

/s/ JOHN F. CONWAY,
Attorney for Appellant.

/s/ LOFTON L. TATUM,
Attorney for Appellee.

So Ordered.

/s/ ALBERT LEE STEPHENS,
United States Circuit Judge.

[Endorsed]: Filed August 20, 1957.

No. 15664

United States
Court of Appeals
For the Ninth Circuit

WALTER HERBERT MACARTNEY,
Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,
Appellee.

Petition of Appellant for Rehearing

**Appeal from the United States District Court
for the District of Oregon.**

HON. GUS J. SOLOMON, Judge

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FILED

MAR 18 1958

PAUL P. O'BRIEN, CLERK



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United States
Court of Appeals
For the Ninth Circuit

WALTER HERBERT MACARTNEY,
Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,
Appellee.

Petition of Appellant for Rehearing

**Appeal from the United States District Court
for the District of Oregon.**

In regard to **Appellant's Specification of Error Number One**, set out in pages 10 to 24 of Appellant's Brief in this appeal to the effect that the trial court committed prejudicial and reversible error in giving supplemental instructions to the jury without counsel or the parties being present, and counsel not having any notice thereof, appellant respectfully submits the following additional authorities and Oregon statute on the subject.

ARGUMENT

ORS. 17.325: "Return of jury for information on law. After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, **the information required shall be given in the presence of, or after notice to the parties or their attorneys.**"

The Oregon Supreme Court said, in the case of **Grammer v. Wiggins-Meyer S. S. Co.** (1928), 126 Or. 694, 270 P. 759, in construing this same statute, from the opinion at page 703:

"7. It is asserted that the court erred in permitting the jury to return and receive additional instructions in the absence of, and without notice to, the defendant or its attorneys. Section 144, Or. L., reads:

'After the jury have retired for deliberation, if they desire to be informed of any point in law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the parties or their attorneys.'

"The only information requested by the jury when they returned into court was in reference to

the preparation of the verdict. A record was made of what the court then and there said to the jury, and the defendant was allowed an exception thereto. Under this state of facts, while the proceedings of the court were technically erroneous, the error is not so substantial as to cause a reversal of the case."

The case of **State of Oregon v. Vaughn** (1954), 200 Or. 275, 265 P. 2d 249, from the opinion at page 277, reads:

"1. The defendant contends that he had an absolute right to have the court redefine the word 'feloniously' upon the request of the jury, relying upon Sec. 5-313, OCLA, now ORS 17.325, which reads as follows:

'After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of or after notice to the parties or their attorneys.'

"It is to be noted that the mandatory obligation of the statute is that if any information as to the law is given by the trial court it shall be given in the presence of the attorneys or after due notice has been given to the parties or their attorneys. This statute does not in itself require the court to reinstruct a jury. It is, of course, necessary that the court state to the jury all matters of law which it

thinks necessary for their information in giving their verdict. Sec. 5-308, OCLA, now ORS 17.255. This was done by the trial court in its charge to the jury at the conclusion of the trial, and the word 'feloniously' was defined in words as follows:

'Feloniously means with criminal intent and intent to commit the crime charged.'

"When the trial court has given to the jury an adequate instruction upon a specific issue in the case and thereafter the jury requests the court to 'reinstruct' upon that issue, the giving of such further instruction rests in the sound discretion of the trial court. State v. Johnston, 221 Iowa 933, 267 NW 698."

The case of **New York Life Ins. Co. v. Rogers** (9th Cir. 1942) 126 F. 2d 784, involved the proposition that under Arizona law an insurer had the power to waive any of the provisions or restrictions contained in an application for a life policy or in the policy itself.

In the opinion of Judge Wilbur, at page 787, this court says:

"The question is one of substantive law, and must, under the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, be determined in the present case in accordance with the law of Arizona."

Sullivan v. Shell Oil Company (9th Cir. 1956) 234 F. 2d 733 was an action for damages for personal in-

juries based on negligence. Jurisdiction of the District Court was based on diversity of citizenship, as in the case at bar.

At page 741, from the opinion, this court says:

"This court in a diversity case is required to determine California law on our precise question."

In regard to the giving of such supplemental instructions in the case at bar, the trial judge, after verdict, said:

"I want to say with reference to the main issue that I was surprised when I made a check and learned that you and Mr. Tatum did not waive your presence here at the time the supplemental instructions were given. I was in error. I was under the impression that you had; but I subsequently learned that the waiver referred to your presence at the time of receiving the verdict and not to the giving of the additional instructions." (T. 194, 195)

Appellant respectfully contends that he is entitled to a rehearing relative to the opinion and judgment of this court filed February 28, 1958, as this court erred, for the reason the law governing the trial court in connection with giving such supplementary instructions to the jury is to be determined in accordance with the law of Oregon, and as set forth in the foregoing statute

and cases, and the trial court should be reversed and this case remanded for a new trial.

Respectfully submitted,

JOHN F. CONWAY,
Attorney for Appellant,
504 Henry Building,
Portland 4, Oregon.

I hereby certify, that in my judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

JOHN F. CONWAY,
Attorney for Appellant.

No. 15664

United States
COURT OF APPEALS
for the Ninth Circuit

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

FILED

MAY 24 1957

PAUL P. WOODEN, CLERK

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Attorneys for Appellee.

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No. 15664

United States
COURT OF APPEALS
for the Ninth Circuit

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

STATEMENT OF THE CASE

The circumstances surrounding appellant's injury are substantially without dispute. He and his longshore gang began unloading crates of glass from the No. 4 hold of the M/S WYOMING at 1:45 P.M. on October 10, 1954. The gang in the hold divided itself into two groups, each working on one side of the ship with appellant in the offshore or port side group. The crates of glass were stowed in the after end of the hatch at the shelter deck level.

The longshoremen took the crates from the place where they were stowed up to the square of the hatch on a four-wheeled dolly furnished by their employer, Oregon Stevedoring Company. When the load reached the square of the hatch, it was tilted by the longshoremen from the dolly onto wooden blocks. Slings were then sent down by the winches, wrapped around the crate and hoisted up.

Each group of longshoremen had one of these dollies. A photograph of a similar dolly is Exhibit 3-B. Such dollies have been in general use in the Portland harbor for 12 to 14 years (T. 152) and were patterned after those used by W. P. Fuller Company (T. 152).

Appellant was injured sometime after two o'clock P.M. He and his partner, Raanes, took the dolly back to the crates and loaded one on it. They then moved the loaded dolly over to the square of the hatch and left it parked there because another crate was already on the blocks on the port side. Both appellant and his partner continued to hold onto the dolly and its load until the slings came down to remove the crate then on the blocks. Raanes left the dolly and engaged himself in securing the sling at one end of the crate. Another man was securing the sling at the after end. For some unexplained reason, appellant left the load on the dolly unattended and stepped in front of it. While he was standing between the crate on the dolly and the one on the blocks, the crate fell off the dolly and upon his legs, causing the injuries of which he complains. A sketch showing the locations of the crates of glass and the longshoremen is Exhibit 27.

In this action the appellant made two charges of fault against appellee, couching them similarly in negligence and under the doctrine of unseaworthiness. He contended first that appellee permitted to be used and used a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on the vessel, and second, that appellee caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean and heel over.

There was no evidence of any defect in the dolly. The same type had been used for 12 to 14 years before the accident (T. 152) and was still being used at the time of trial (T. 153). After the accident the longshoremen continued unloading the glass with the same dolly until the job was completed at 6 P.M. (T. 49). Where there was no evidence of any defect in the dolly being used at the time of appellant's injury and no evidence of any improper or inadequate construction of the dollies generally, appellant wholly failed to prove his first charge of fault, either in negligence or unseaworthiness.

There was likewise a complete failure of proof that unloading operations caused the ship to "lurch, careen, tilt, slant, lean and heel over." At the time of appellant's injury, there was no unloading operation being conducted anywhere on the vessel. Only two hatches had gangs working, No. 4, where appellant was, and No. 3, where they were loading frozen fish (T. 132, Ex. 25). No unloading at No. 4 could have caused any movement of the ship because at the time of appellant's injury

there was no cargo on the gear at No. 4. As the winch driver testified (T. 113):

“Q. So that the operation of your gear to [at] that moment of his injury could not have caused any movement of the ship?

A. Not our particular gear, no.”

Much is said in appellant's testimony attempting to make out a permanent inshore list. Not only was such testimony outside the issues of the case, but it also failed to prove the existence of such list or a causal connection with the accident. At most the longshoremen felt that the offshore gang had an easier job to push their dollies. The supercargo testified that there was no appreciable list the day of the injury and defined appreciable as anything over two or two and a half degrees (T. 137).

Inasmuch as no unloading operations were being conducted when appellant was injured, any movement of the vessel was only the normal working of a ship in water. As such the longshoremen are well aware of it and work accordingly. As stated by Mr. DeFrancisco, one of the other longshoremen in the hold (T. 80, 81):

“Q. In your experience on the water front, Mr. DeFrancisco, isn't it true that all ships while they are being loaded or unloaded work a little bit in the water back and forth?

A. Usually they do rock back and forth.

Q. Not only by cargo but a passing ship might make it go?

A. Yes, that is right; it will bob.

Q. It is something that you experienced longshoremen are aware of? You know about it?

A. Yes, I know about it.

Q. And in your loading or unloading operations you always take that into account on how you are

working, do you not, that the ship is going to be moving a little bit?

A. Well, yes, if you put it that way, it is something—when you work on a ship like that there you get used to that movement, and it's just like working out here on the floor, it don't bother you. It don't actually bother you in any way."

* * * * *

Q. If there is this constant movement on a ship, the rocking back and forth that we have talked about, you conduct your work accordingly to protect yourself, don't you?

A. That is right.

Q. You have to?

A. That is right."

Under the issues in this case, the record shows that appellant has not produced any evidence to justify a judgment in his favor. This was the finding of the jury and was concurred in by the trial judge. The trial court so indicated when taking appellee's motion for a directed verdict under advisement (T. 159). Special interrogatories were submitted to the jury, which it answered as follows (T. 15):

"1. Was the dolly unseaworthy or unsafe?

A. No.

2. Was the M/S Wyoming caused to lurch, careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time?

A. No."

After the verdict, the trial court again indicated its feeling of the lack of merit in appellant's case (T. 195):

"All this is in addition to the fact that throughout the trial I indicated to you that I could not see where there was any negligence. I know that I told

you that at the end of the plaintiff's case in chief and again when the case was completed. I believe I indicated to you, but, if I didn't, I intended to tell you that if you did get a verdict I would set it aside on the ground that there was no evidence of negligence whatsoever on either of the two grounds that you alleged. In view of that fact, I am not in a position to certify that this appeal has any merit, and under no circumstances would I order the Government to pay the costs of a transcript and record on appeal. In view of my strong belief about the lack of merit of your case, I cannot see how I could do that."

Despite the foregoing, appellant seeks reversal in this court, clutching at straws in an attempt to substantiate error. As will be demonstrated, none of appellant's points of error has merit.

SPECIFICATION OF ERROR NUMBER ONE

Summary of Appellee's Points

Counsel has a duty to be in attendance with the court to protect his client's interest at all times between the impaneling of the jury and the return of the verdict. His failure to be present at any time during the proceedings constitutes a waiver on his part.

Stewart v. Wyoming Cattle Rancho Co., 128 U.S. 383, 32 L. Ed. 439.

Finn v. Carnegie-Illinois Steel Co. (D.C., W.D. Pa., 1946), 68 F. Supp. 423.

Hartol Petroleum Corp. v. Cantelou Oil Co. (D.C., W.D. Pa., 1952), 107 F. Supp. 373.

Arrington v. Robertson (C.C.A. 3, 1940), 114 F.2d 821.

No error was committed by the trial court in giving supplemental instructions to the jury in open court and with the court reporter present recording the proceedings, even though counsel for the parties were not present.

Stewart v. Wyoming Cattle Rancho Co., 128 U.S. 383, 32 L. Ed. 439.

Finn v. Carnegie-Illinois Steel Co. (D.C., W.D. Pa. 1946), 68 F. Supp. 423.

Yates v. Whyel Coke Co. (C.C.A. 6, 1915), 221 F. 603, 608.

The supplemental instructions as given by the trial court were not prejudicial to appellant, and therefore could not be ground for reversal.

Sandusky Cement Co. v. Hamilton & Co. (C.C.A. 6, 1923), 287 F. 609.

Ray v. U. S. (C.C.A. 8, 1940), 114 F. 2d 508, 513.

Ah Fook Chang v. U. S. (C.C.A. 9, 1937), 91 F. 2d 805.

Argument on Specification One

Appellant contends that the giving of supplemental instructions to a jury in the absence of counsel is error. The rule announced by the courts is not as broad as appellant urges, and the cases cited by him do not support his proposition.

There is no doubt that the jury system is founded upon the theory that disinterested jurors will hear the evidence in open court and on that evidence alone deliberate among themselves until a verdict is reached. Any communication with the jury that is not made in open court is subject to abuses and opens the way toward the

destruction of confidence in the jury system. *Ray v. United States*, 114 F. 2d 508, 513.

In every one of the cases cited by appellant the communication with the jury was not in open court. In *Filippon v. Albion Vein Slate Co.*, 250 U.S. 76, 63 L. Ed. 853, the jury sent the judge a written inquiry. The judge replied with a written instruction sent to the jury room, in the absence of parties and their counsel, without their consent and without calling the jury in open court. The instruction sent to the jury room was also an erroneous instruction. In reversing the Supreme Court called attention to the rule (250 U.S. at page 81):

“Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had.”

The next case cited by appellant, *Arrington v. Robertson*, 114 F. 2d 821, presented similar facts. The trial court sent a written instruction to the jury room in response to the request of the jury. The record, however, did not disclose the jury's question, so the appellate court could not determine whether the supplemental instructions, although correct in the abstract, were appropriate. Again, the appellate court based its decision on the “private” nature of the communication.

Snyder v. Lehigh Valley Ry. Co., 245 F. 2d 112, is another instance of a “private” communication. The jury sent a written inquiry to the trial judge, who, without notice to counsel, orally instructed the marshal to advise

the jury that the answer to their question was in the negative. The answer of the trial court was based on an erroneous assumption.

This was also the factual situation in *Parfet v. Kansas City Life Ins. Co.*, 128 F. 2d 361, where the jury handed the bailiff a note to the judge. The bailiff took the note to a deputy marshal who in turn took it to the judge's residence. The judge directed the marshal to answer the inquiry verbally, which was done.

The fatal error in *Ah Fook Chang v. United States*, 91 F. 2d 805, was similar. Here the foreman of the jury went to the judge with a question. The court, in the presence of both counsel, in chambers, gave additional instructions to the foreman to pass on to the jury. Because there was no way of knowing what the foreman relayed to the jury, the cause was reversed.

It is quite apparent from this analysis that the citations relied upon by appellant stand at most for the rule that "the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had." *Fillippon v. Albion Vein Slate Co.*, supra. In none of appellant's citations was this admonition of the Supreme Court observed.

But the facts in the cause herein do show that the Supreme Court's directions were followed. The additional instructions were given in the courtroom to which the jury had returned and were officially reported by the court stenographer (T. 184). Under such circum-

stances, it was the duty of counsel to be in attendance. If he has failed to do so, he has waived his right to be present and cannot complain at this time.

It has been repeatedly held by the United States courts that it is not error for the court to instruct the jury in open court in the absence of counsel while the court is in session.

The leading case on this point is *Stewart v. The Wyoming Cattle Ranch Company* (1888), 128 U.S. 383, 32 L. Ed. 439, where the court stated, at page 390:

"The absence of counsel while the court is in session, at any time between the impaneling of the jury and the return of the verdict, cannot limit the power and duty of the judge to instruct the jury in open court on the law of the case as occasion may require."

Recently this rule was followed in *Finn v. Carnegie-Illinois Steel Corp* (D.C., W.D.Pa. 1946), 68 F. Supp. 423. At page 428 the court held:

"Furthermore counsel interested in a case which is on trial has a duty to be in attendance with the court to protect his client's interest until the whole subject matter of the litigation is finally disposed of, and that the court is not thereby required to suspend its operations until counsel is present. *Ward v. Todd*, 103 U.S. 327, 330, 26 L. Ed. 339; *Cooper et al v. Morris*, 48 N.J.L. 607, 7 A. 427; *Cornish v. Graff*, 36 Hun. 160; *Aerhart v. St. Louis I. M. & S. R. Co.*, 8 Cir., 99 F. 907, 910; *Yates v. Whyel Coke Co.*, 6 Cir., 211 F. 603, 608."

Even some of the authorities relied on by appellant as granting reversals because the supplemental instructions were not given in open court point out the proper

standards to be those laid down in *Stewart v. Wyoming Cattle Rancho Co.*, supra. In *Arrington v. Robertson*, 111 F. 2d 821, it was stated (P. 823):

“A party or his counsel may waive this right [to be present at every stage of the trial] expressly. He may also waive it by voluntarily absenting himself from the courtroom in which the trial is being conducted, and in that case the trial judge may proceed with the trial in his absence even to the extent of recalling the jury from their deliberations for such additional instructions on the law as occasion may require. *Stewart v. Wyoming Rancho Co.*, 128 U.S. 383, 9 S. Ct. 101, 32 L. Ed. 439. But as was pointed out in the *Fillippon* case the parties are entitled to anticipate and bound to presume, in the absence of notice to the contrary, that all such proceedings will take place in open court in the courtroom assigned for the trial and will be reported by the court stenographer. Consequently a party or his counsel who voluntarily absents himself from the courtroom consents to such proceedings only as take place in the courtroom in his absence but not to proceedings which take place elsewhere. *Ah Fook Chang v. U. S.*, 9 Cir., 91 F. 2d 805.”

See also, *Hartol Petroleum Corp. v. Cantelou Oil Co.*, 107 F. Supp. 373; *Yates v. Whyel Coke Co.*, 221 F. 603, 608; *Railway Express Agency v. Little*, 50 F. 2d 59.

From the facts here and the foregoing authorities it is clear that no error was committed by the trial court in giving the jury supplementary instructions in open court, especially in view of the voluntary absence of counsel.

In any event, the supplementary instructions as given by the court did not change or modify the original instructions and did not prejudice any rights of appellant.

It must be conceded that, where appellant was not prejudiced by the supplementary charge, there can be no ground for reversal. *Sandusky Cement Co. v. Hamilton & Co.*, 287 F. 609; *Ray v. United States*, 114 F. 2d 508, 513; *Ah Fook Chang v. United States*, 91 F. 2d 805.

Appellant makes only two claims that the supplemental instructions in any way were prejudicial to him. These claims are also set forth as Specifications of Error Numbers Four and Five, and are discussed in greater detail in answer to those specifications.

His first claim of prejudice is that the trial court's later instruction changed or modified the degree of proof required (T. 188). An analysis of the entire instruction, which is necessary to get a proper perspective of the phrase taken by appellant out of context, shows that the trial court was merely giving a rather commonly used direction to the jury to arrive at a verdict if it could possibly do so. It suggested only that each juror test his convictions again against the reasonable doubt to the contrary held by his fellow jurors. It did not in any way suggest a new or different degree of proof to be required to sustain a verdict for either party.

The other claim is that some confusion might have arisen with regard to the standards required under the doctrine of seaworthiness (T. 191). This instruction, when considered in the light of the issues of the case and the seaworthiness rule which requires reasonable care and fitness, but not perfection, could not have confused the jury and was not prejudicial to appellant.

When taken as a whole the court's supplementary

instructions were carefully given, and in no way did they change or modify the original instructions. At the very beginning (T. 185) the court carefully directed the jury to consider his supplemental instructions "in the light of the instructions which I previously gave you." After answering the jury's inquiry concerning negligence in a manner which appellant has not challenged in this appeal, the court turned to its instruction urging the jury to agree upon a verdict if it were at all possible without violating the juror's individual judgment and conscience, and concluded by answering the juror's question to define "defective" under the issues of this case. Such instructions were not prejudicial to appellant.

That the jury was not misled is thus shown by the manner in which the jury answered the clear and simple interrogatories submitted to them,—

"1. Was the dolly unseaworthy or unsafe?

A. No.

2. Was the M/S WYOMING caused to lurch, careen, tilt, slant, lean or heel over by reason of the fact that too much cargo was being unloaded from one part of the ship at that time?

A. No." (Tr. 15)

This shows no confusion, uncertainty or hesitancy and squarely meets the specific claims of appellant.

Where the trial court was entitled and under a duty to give additional instructions to the jury when requested by him, and the instructions so given are without error and without prejudice to any rights of appellant, there can be no error under appellant's first specification. Counsel cannot create error due to his absence at the time of the giving of these instructions under the circumstances here.

SPECIFICATION OF ERROR NUMBER THREE

Summary of Appellee's Point

A jury will not be misled or influenced by the presence or absence of an instruction informing them of the amount of plaintiff's prayer.

Hoffschlaeger Co. v. Fraga, 290 F. 146.

Argument on Specification Three

Appellant challenges the court's instruction on damages because the court did not tell the jury that his general damages were to be "not exceeding \$85,000.00," the amount of his prayer. He does not criticize any other aspect of the instruction on damages.

This point has been frequently raised by defendants who have objected to instructions which did set forth the amount prayed for by plaintiffs. In the cases cited by appellant the courts have held such objection to be an insult to the intelligence of the jury to believe that stating the amount of the claim would influence the jury.

"But why should the jury be influenced by the amount claimed by the plaintiff, any more than by any other claims advanced by the parties? Such claims are not evidence, and it is an insult to human intelligence to say that they are likely to mislead or otherwise influence the jury." Hoffschlaeger Co. v. Fraga (C.C.A. 9, 1923), 290 F. 146.

The amount of damages for personal injury is always a matter for the best judgment and discretion of the jury based upon the evidence before it. The amount

prayed for in the complaint provides them with no guidepost other than the most imaginative guess of plaintiff's counsel. What the jury needs to know to arrive at a sound decision is the pain and suffering and injuries, past, present and future, his earnings and how his injury will affect his future earnings, the nature of his occupation, age, sex, health and habits. Based upon such evidence, as was explained to this jury (T. 173-175), the jury may find such amount as will reasonably compensate plaintiff. The optimistic hopes of counsel for plaintiff, as expressed in the prayer, cannot be any sort of basis for determining the proper amount of damages.

No cases have been cited by appellant holding that failure to tell the jury the amount of plaintiff's prayer was reversible error. His authorities hold, in effect, that while such an instruction may not be necessary, if given, it is harmless and not prejudicial to the defendant. If telling the jury does not prejudice the defendant, it is difficult to see how not so advising the jury can in any way prejudice the plaintiff. A declaration to the jury of the amount of plaintiff's prayer is a matter to be left to the sound discretion of the trial court.

The jury here decided that there was no liability on the part of appellee, and thus never reached the question of damages. The presence or absence of the amount of the damages claimed by appellant was never a factor considered by them.

SPECIFICATION OF ERROR NUMBER FOUR

Summary of Appellee's Points

It is entirely proper for a trial court, after a jury has been deliberating the issues of a case, to give additional instructions urging the jurors to make every honest and reasonable effort to arrive at a verdict.

Allis v. United States, 155 U.S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528.

Hill v. Wabash Ry. Co., 1 F. 2d 626.

The trial court's instruction, when read in its entirety (T. 186-189), is supported by the authorities.

Allen v. United States, *supra*.

Allis v. United States, *supra*.

Hill v. Wabash Ry. Co., *supra*.

Railway Express Agency v. Mackay, 181 F. 2d 257.

The instruction did not change or modify the court's original instruction upon the degree of proof required.

Argument on Specification Four

In his fourth specification of error, appellant claims the trial court changed or modified its original instructions concerning the degree of proof required. He has taken a phrase from the supplementary instructions and used them out of context in attempting to support his claim.

An examination of the entire charge of the court on this phase (T. 186-189) shows that the court was urging

the jury to arrive at a verdict if it was at all possible without violating the individual judgment and conscience of each juror. This type of instruction has been given frequently by the courts, and so long as the instruction does not intrude upon the jury's independence, it has been approved by the appellate courts.

Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528.

Allis v. United States, 155 U.S. 117, 15 S. Ct. 36, 39 L. Ed. 91.

The court in *Hill v. Wabash Ry. Co.*, 1 F. 2d 626, summarizes these decisions at page 632:

"From these decisions the conclusion is apparent that the court has the right to attempt to assist the jury by proper instructions in reaching a verdict without intruding on the fundamental right of the jury to determine fact questions."

See also *Railway Express Agency v. Mackay*, 181 F. 2d 257.

The trial court very carefully refrained from doing more than urge the jury to attempt to reconcile any differences they had if it were at all possible. It was repeated many times that each juror should not surrender any honest convictions as to the weight or effect of the evidence.

The court did, in addition, request that each juror examine his views carefully, particularly if a great number of the jurors, who had seen and heard the same witnesses and evidence, had contrary views. When discussing this point, the court asked each dissenting juror to consider whether the doubt in his mind was a reasonable one.

It was first stated from the appellant's standpoint:

"If much the greater number of you are for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict." (T. 188)

Then the court stated the alternative from appellee's standpoint:

"On the other hand, if a majority or even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt." (T. 188)

By reading all of this, along with the remainder of the instruction on this point, it is clear that the court was not in any way discussing the degree or burden of proof, which had been adequately covered in the original instructions. All that these supplemental instructions did was to ask that each member of the jury test his views against those being held by others—to re-examine his views as to their reasonableness when placed alongside the convictions of his fellow jurors. This is not altering the instructions on degree of proof.

The meaning of these supplemental instructions is apparent when the court went on immediately following the portions quoted above:

"I think that while one juror, if he is convinced that all the rest of them are wrong, may hold out, and should, but the greater the number who are on one side, the more those dissenting jurors should re-examine their views to see whether there is a rational basis for the opinion which they hold when other jurors or so many other jurors are of the contrary opinion."

The foregoing shows that appellant's initial premise in his contentions under this specification is unsupportable. It is always possible to take some phrase or sentence out of the context of the court's instructions, distort the meaning and claim error. But appellate courts have long held that they will look to the entire charge to determine if there is any confusion in the instructions. Such an examination in the instant case shows neither confusion nor conflict with the court's original instructions nor the imposition of any greater burden upon appellant.

SPECIFICATION OF ERROR NUMBER FIVE

Summary of Appellee's Points

Seaworthiness does not require perfection. It is sufficient if the vessel and her appliances are reasonably fit and safe for its purposes and reasonably adequate as to the place and occasion.

The Tawmie, 80 F. 2d 792.

Ruberry v. United States, 93 F. Supp. 683.

Jacob v. City of New York, 315 U.S. 752, 86 L. Ed. 1166.

Sanderson v. Sause Bros. Ocean Towing Co., 114 F. Supp. 849.

Argument on Specification Five

Appellant in his final claim confuses a portion of the supplemental instructions and attempts to magnify his own confusion into a specification of error. The charge which is challenged is:

“Mrs. Hruby: Could you please give us a definition of the word ‘defective’.

The Court: ‘Defective’ in this instance would be a piece of equipment which a reasonably prudent person would not have maintained. It does not have to be a perfect piece of equipment. I think I explained that to you. The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances.”

Throughout this case appellant combined his claims of negligence and unseaworthiness. He claimed the dolly being used was unsafe and unseaworthy and, that because the ship was caused to lurch, it became unsafe and unseaworthy (T. 7, 8). The identical claims were made, but he stated he was proceeding simultaneously under the theory of negligence and the theory of unseaworthiness.

The trial court instructed under both theories, as to unseaworthiness (T. 163-4) and as to negligence (T. 165-6). It also submitted special interrogatories to the jury, asking, “Was the dolly unseaworthy or unsafe?” (T. 172)

It was, therefore, necessary for the court to answer the juror’s inquiry in terms of both negligence and unseaworthiness, which it properly did.

While appellant cites cases holding that unseaworthi-

ness is a species of liability without fault, such cases are not in point under this discussion. The validity of the court's instruction rests upon the standards required by the doctrine of seaworthiness. These standards are not considered by appellant, for when the court's charge is read in light of these established standards, the lack of merit in appellant's specifications is readily apparent.

The test of seaworthiness is whether the appliance or vessel is reasonably fit and safe for its purpose. There is no obligation to supply the best equipment but only such as is reasonably safe and suitable. *The Tawmie*, 80 F. 2d 792; *Ruberry v. United States*, 93 F. Supp. 683; *Jacob v. City of New York*, 315 U.S. 752, 86 L. Ed. 1166; *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849.

So under either of appellant's theories, as to the dolly, the jury was to determine whether it was reasonably safe and suitable. In the quoted supplemental instruction the court so told the jury. In effect it told the jury they must not test the dolly against what might be "perfect" but only against the standards of "reasonableness."

CONCLUSION

This cause was completely presented to the court and jury at the trial. Based upon the evidence, both the court and the jury felt there was no basis for recovery, as has been indicated previously in this brief. Appellant's claims of error are without substance.

Appellant urges this court in his concluding argument to determine as a matter of law that appellee was guilty of negligence and unseaworthiness. As has been pointed out, there is no substantial evidence in the record to support either charge. To follow appellant's suggestion this court would be required to find evidence where none exists and to go contrary to the trial court and the jury, both of whom saw and heard the witnesses. Such a review of the evidence has not been the practice of this court.

It is, therefore, respectfully submitted that the judgment in this cause is correct, that the jury verdict is the only conclusion which could have been reached upon the evidence, and that no errors were committed by the trial court which would justify action by this court.

Respectfully submitted,

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No. 15664

**United States
Court of Appeals
For the Ninth Circuit**

WALTER HERBERT MACARTNEY,
Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,
Appellee.

Brief of Appellant

**Appeal from the United States District Court
for the District of Oregon.**

HON. GUS J. SOLOMON, Judge.

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FILED

OCT 31 1957

PAUL P. O'BRIEN, CLERK

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**United States
Court of Appeals
For the Ninth Circuit**

WALTER HERBERT MACARTNEY,
Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,
Appellee.

Brief of Appellant

**Upon Appeal from the District Court of the United
States for the District of Oregon.**

STATEMENT OF JURISDICTION

This is an action at law for personal injuries between a longshoreman and citizen of the State of Oregon and a foreign corporation existing under the laws of France (T. 3, 4) in which the appellant claims damages of more than \$85,000.00 for a maritime tort against appellee corporation. (T. 3, 4). A final judgment in favor of appellee and against appellant, based upon the verdict of a jury, was filed on April 24, 1957, and this appeal

was thereafter seasonably perfected (T. 16, 17), and bond for costs on appeal filed. (T. 199, 200). It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of the above facts under 28 U.S.C.A., Sections 1331, 1332, sub. 2, and 1333, sub 1; and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under 28 U.S.C.A., Sections 1291 and 1294. (T. refers to Transcript of Record.) (Blackface type where used are supplied by appellant.)

STATEMENT OF CASE

The admitted facts in this case, as set out in the Pretrial Order (T. 3, 4, 5), show:

1. Appellee was and now is a foreign corporation existing under the laws of the Republic of France; it had and now has a Pacific Coast agent and maintains a regular sailing schedule of its vessels to and from the port of Portland, Oregon.

2. That at all material times this appellant was and now is a citizen of the United States and lived and resided in and still has his residence and domicile in Portland, Oregon, and this controversy involves a cause for more than \$3,000.00 damages.

3. That at all times hereinafter mentioned the M/S WYOMING was and is a French motor ship, in the possession of and owned, operated and employed by de-

fendant corporation in maritime commerce, as a passenger and merchant vessel between points in Europe and points in the United States of America.

4. That on or about October 10, 1954, the appellee had a stevedoring contract with the Oregon Stevedoring Company, an Oregon corporation, to act as stevedores for appellee's vessels, including the M/S WYOMING at Portland, Oregon.

5. That on or about and prior to October 10, 1954, appellant was regularly employed by said Oregon Stevedoring Company as a longshoreman to assist in unloading cargo on said vessel as aforesaid at Portland, Oregon, and at the time of the occurrences hereinafter mentioned, the appellant was engaged in the performance of his regular duties and in the course of his regular employment with said Oregon Stevedoring Company, working on board such vessel and in connection with unloading such cargo, while such vessel was moored and docked on navigable waters.

6. That in the afternoon of October 10, 1954, appellant was working in No. 4 hold of said vessel in connection with unloading cargo consisting of heavy crates of glass which were moved on a certain hand operated, 4-wheeled dolly, which had been furnished by and were being used by said Oregon Stevedoring Company and its employees.

8. Appellant has elected to pursue a remedy against defendant pursuant to the Longshoremen and Harbor Worker's Compensation Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation at Seattle, Washington, a notice of his election to sue.

The evidence shows that appellant and another longshoreman had moved a crate of glass into the square of the hatch of No. 4 hold, and that such crate of glass was left sitting in the square of the hatch while appellant and another longshoreman then took the 4-wheeled dolly into the wing of the hatch and placed another crate of glass weighing about 1500 pounds on said dolly, and then moved the dolly over to near the square of the hatch and left the crate standing on the dolly, just a few feet back of the crate that had been left in the square of the hatch, and parallel with the hatch and such crate. Then appellant stepped in front of the crate of glass on the dolly that was sitting unattended and had his back to it while he faced the shore and started to assist another longshoreman in hooking up the crate of glass that was then sitting in the square of the hatch. While he was doing this, the dolly with the crate of glass on it which was behind him tipped towards inshore and thereby suddenly precipitated the large crate of glass then on such dolly and weighing about 1500 pounds, upon appellant from be-

hind, and the crate of glass fell upon both of his legs, a little below each knee. (T. 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 49, 53, 68, 69, 76, 100 to 109 inclusive).

The witness Foster and other witnesses of appellant also identified a picture of the same type of dolly used when appellant was injured. (Appellant's Ex. 3-B, T. 31, 32, 33, 51, 63, 74, 102, 119).

Witness Henry L. Foster testified **that the dollies used since the accident were made bigger and wider, and that makes them harder to tip over when loaded with a crate of glass.** (T. 49).

Several of appellant's witnesses testified to the effect that there was a noticeable and substantial inshore list existing on the ship before and after appellant was injured (T. 29, 30, 31, 34, 35, 37, 58, 59, 64, 65, 78, 106, 107, 108, 109).

Several of appellant's witnesses also testified that it was the customary and usual practice and procedure to put a crate of glass out in the square of the hatch and leave another crate of glass sitting on a dolly behind the longshoremen while slinging out the crate in the hatch. (T. 109, 117, 119, 82, 83, 84, 39, 40).

Dr. Howard L. Cherry testified about the serious and permanent injuries appellant received as a result of this crate of glass crushing both of his legs. (T. 85 to 100 inclusive).

Appellant testified as to his injuries, disability, loss of substantial earnings, and how he was injured. (T. 115 to 128 inclusive). His wife testified about his good health before he was hurt and his disability afterwards. (T. 114).

Edwin C. Davis, appellee's expert witness, who is president of Oregon Stevedoring Company, testified on cross-examination:

"Q. How much would the heaviest case of glass weigh that they moved on these dollies?

A. I couldn't answer offhand without checking the records.

Q. **Well, would it be as much as a ton?**

A. **Oh, no; we couldn't—you couldn't handle that much on one of those dollies safely.**

Q. 2,000 pounds?

A. What?

Q. **Could you handle 1,000 pounds?**

A. **I imagine you could get away with a thousand pounds all right, but it's more likely they run around 600."** (T. 155).

The specifications of unseaworthiness that the court instructed the jury on are set out in the instructions (T. 163) and are as follows:

"In plaintiff's claim based upon contract he asserts that the motorship operated by the defendant was unseaworthy in two respects: **First**, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as

part of the regular gear, appliances and equipment used on said vessel. That is what the plaintiff contends first. Plaintiff's second contention is that the vessel was unseaworthy in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over. That is what plaintiff claims as his second ground."

* * * *

"The specifications of negligence (T. 166) upon which plaintiff must recover, if at all, are as follows:

"First, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on said vessel; and,

"**Second**, in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over."

"These specifications, as you will note, are the same specifications alleged by the plaintiff to have rendered the ship unseaworthy. He asserts that they also constitute negligence."

* * * *

"In this connection, I instruct you that the owner or operator of a vessel is under a duty to provide safe gear and equipment and a safe working place for all stevedoring operations on board ship. But, here again, I want to call your attention to the fact that a ship is not an insurer of the safety of all persons using its facilities and that the standard required of the defendant is not absolute safety but reasonable safety." (T. 166, 167).

After all the evidence was in and both parties had rested, the appellee moved for a directed verdict upon the ground that there was no substantial evidence to support any of the charges of unseaworthiness, and on the second ground that there was no substantial evidence to support any of the grounds of negligence charged in the complaint. The trial judge reserved ruling upon such motion. (T. 158, 159).

The court instructed the jury upon the theory of negligence and also upon the theory of unseaworthiness as heretofore indicated, and the jury retired to deliberate upon its verdict at approximately 3:00 o'clock p. m. on April 24, 1957.

Thereafter, at about 6:00 o'clock p. m. of the same day, the jury foreman notified the trial judge that the jury could not agree upon a verdict. The trial judge thereupon had the jury come back into his court room, without notifying counsel for appellant or appellee of such proceedings, and counsel not having waived the right to appear, the trial judge thereupon proceeded to give supplementary instructions to the jury, in the absence of the parties and their respective attorneys and without affording them an opportunity to be present and make any objections to any portions of such supplementary instructions. On May 21, 1957 the trial judge admitted he was in error concerning both counsel not waiving their presence at the time such additional in-

structions were given. (T. 184 to 191 inclusive, 194, 195).

After receiving these additional instructions, the jury again retired, and at approximately 8:30 p. m. of the same day returned into court with a verdict in favor of the appellee, and judgment thereon was filed on April 24, 1957.

Appellant contends that the trial judge committed prejudicial and reversible error in making such additional instructions to the jury under such circumstances; that he also erred in failing to instruct the jury as to the amount and measure of appellant's damages as requested by appellant and excepted to; that the trial judge further erred when he instructed the jury in such additional instructions that they should be convinced and decide beyond a reasonable doubt; and further, in such additional instructions, the trial judge incorrectly stated the law as to the test of seaworthiness that "the test of seaworthiness is not perfection, but what a reasonably prudent person would have done under all the circumstances," and such trial judge further erred by giving additional instructions that were conflicting with his original instructions to the jury.

SPECIFICATIONS OF ERROR NUMBER ONE

1. That the trial court erred in giving supplementary instructions to the jury after the jury had been out approximately three hours and could not agree on a verdict, which supplementary instructions were given in the absence of the parties and their respective attorneys who were not notified of such proceedings, and without affording them an opportunity to be present, and to make any objections to any portions of such supplementary instructions.

The supplementary instructions (T. 184, 185, 186, 187, 188, 189, 190, 191) complained of in this case are as follows:

(The jury having been duly instructed by the Court in the above-entitled cause, and having retired at 3:00 P.M. for deliberation on their verdict and returning to the courtroom at 6:00 P.M., the following proceedings were had:)

THE COURT: Ladies and Gentlemen of the Jury, I understand the jury is in disagreement. Who is the foreman?

MR. HERMAN J. FOELLER: I am, your Honor.

THE COURT: Is it correct that the jury is in disagreement?

MR. FOELLER: That is correct.

THE COURT: Is there any instructions I gave that was not clear and which you would like to have repeated?

MR. FOELLER: I think the instruction if you find negligence in the hold of the ship where it is imputed on down to the steamship itself, if that is clarified we could reach a decision. We are a little confused that there may have been some negligence down there by the employes, and the opinion is that because they were a stevedoring company and so on, down to the French Line itself.

THE COURT: Let me just say this to you, and what I am going to say now must be considered in the light of the instructions which I previously gave you. Ordinarily, I do not like to give one instruction because it lays greater emphasis on it, but I think what I said before and what I repeat now is the test of what a reasonable person would have done under the same or similar circumstances. In other words, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

There are two grounds upon which the plaintiff claims that the ship was at fault: One, in permitting to be used and in using a dangerous, unsafe, and un-

seaworthy dolly or hand truck as part of the regular gear, appliances, or equipment used on the vessel.

In other words, in order to find for plaintiff you have to first find that this dolly was unsafe and unseaworthy, or, in the alternative, if you find that the ship caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean and heel over. In order to find for plaintiff you have to find that one of these two things which were proved by the plaintiff caused or participated in causing the accident.

If the acts of the employees of the Oregon Stevedoring Company were solely responsible for the accident, or if the plaintiff himself did something, one or more things, for instance, failing to keep a proper lookout or leaving the dolly unattended with the glass on it, if you find that that is solely the cause of the accident, then you would return a verdict in favor of the ship.

You would return a verdict in favor of Mr. Macartney, the plaintiff, if you found that the dolly was defective or if the ship was leaning, and as a result of that he suffered this accident.

It is also true that if the ship was negligent and if Mr. Macartney was negligent and the negligence of both combined to cause the accident, then you would

allow plaintiff to recover, but you would reduce the damages.

Has that helped you any?

MR. FOELLER: It has helped me some.

MR. KESWICK: It has helped me plenty.

THE COURT: I want to suggest a few thoughts which you may consider in your deliberations along with all the evidence and all the instructions which I previously gave you.

I know that you have been deliberating now for some time. This is an important case, and the trial, while it has not been long, it has been expensive for both sides, and if you fail to agree upon a verdict the case is left open and undecided. Like all cases, it must be decided sometime, and there appears no reason to believe that the case can again be better tried or more exhaustively tried. As I told you, the case was presented by two very competent lawyers, both of whom knew their business. Any future jury must be selected in the same manner and from the same source as you have been chosen so there appears no reason to believe that the case would be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it or that clearer evidence can be produced on behalf of either side.

Of course, these matters suggest themselves, upon

brief reflection, to all of us who have sat throughout this trial. The only reason I mention them is because some of them may have escaped your attention because you may have been devoting your time to a review of the evidence and the law.

I think I told you before that I do not expect anyone to surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or solely for the purpose of returning a verdict. I do not think a person should do that; however, I think I told you just before the conclusion of my remarks that it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors, and in the course of your deliberations you should not hesitate to change your opinion when convinced that it is erroneous. In order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to, and regard for the opinions of the other jurors. That is to say, in conferring together each of you should pay due attention and respect to the views of others and listen to each other's arguments with a disposition to re-examine your own views. If much the greater number of you are

for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict.

On the other hand, if a majority of even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and **Whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt.**

I think that while one juror, if he is convinced that all the rest of them are wrong, may hold out, and should, but the greater number who are on one side, the more those dissenting jurors should re-examine their views to see whether there is a rational basis for the opinion which they hold when other jurors or so many other jurors are of the contrary opinion. I think in other cases I have told you, those of you who have served, that you are not partisans. You are judges, judges of the facts, and your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive

judges of the credibility of all witnesses and the weight and effect of evidence, and in the performance of this high duty of jurors you are at liberty to disregard all comments of the judge as well as the attorneys, including of course the remarks which I am now making.

I hope you will remember that no juror is expected to yield the conscientious conviction which he or she may have as to the weight or effect of evidence, but remember also that after a full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

It is 6:15. If you want to go back and deliberate now, that is fine. If you want to go out to dinner, that is perfectly all right, and you can then deliberate later. I am not trying to rush you. You can deliberate as leisurely as you want. I am hopeful that you can arrive at a judgment if you can do so without violation of your individual conscience, but again I want to say that I am going to leave it up to you.

What do you want to do about it?

MR. FOELLER: We will go back upstairs.

THE COURT: Is there any question, Mr. Kniss?

MR. KNISS: Yes, your Honor. If I understand you properly now, it is a decision that even though we find the plaintiff——what do I want to say here——negli-

gent and the steamship both negligent to some degree, we still can allow damages or some of that?

THE COURT: That is right. If you find that the steamship company did something they should not have done or failed to do something they should have done, you can find for plaintiff even though you find that the plaintiff did something he should not have done, and under these circumstances you apportion the damages.

MR. KNISS: That is right.

THE COURT: But if you find that the stevedoring company was solely responsible for the accident or if you find that the plaintiff was solely responsible for the accident, you may not return a verdict in favor of the plaintiff. If you find, however, that the steamship company did something that it should not have done and what it did caused the plaintiff's accident and the plaintiff was free from negligence, then you give the plaintiff the full amount of damages. Do I make myself clear on that?

MR. KNISS: I think that is the main point that was holding us up.

MR. CRISTAL: There are only two points we can judge on; that is, the equipment and the rocking of the boat?

THE COURT: That is all. You cannot consider anything else. I just want to answer your questions. You

can only consider those two things that the plaintiff has specified. You cannot consider any other ground of negligence not raised, that I did not instruct you on, even though you think that the company was negligent in that respect or even though you might think that the plaintiff was negligent in some respect not designated. Mrs. Hruby?

MRS. HRUBY: Could you please give us a definition or the word "defective."

THE COURT: "Defective" in this instance would be a piece of equipment which a reasonably prudent person would not have maintained. It does not have to be a perfect piece of equipment. I think I explained that to you. The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances.

(Thereupon the jury retired for further deliberation.)

Thereafter the trial judge admitted that he was in error when he learned that both counsel did not waive their presence at the time such additional instructions were given, and in the absence of counsel (T. 194, 195).

ARGUMENT

In the case of **Fillippon v. Albion Vein Slate Co.**, 1919, 250 U.S. 76, at page 81, 39 S.Ct., 435, at page 436, 63 L.Ed. 853, which case involved an action for damages for personal injuries, the Supreme Court said:

"We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is empaneled until it is discharged after rendering the verdict. Where a jury has retired to consider their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction."

In the case of **Arrington v. Roberson**, 1940, 114 F. 2d 821, 822, the question presented was:

"Whether it was reversible error for the trial

judge, in the absence of counsel for the parties and without notice to them, to send instructions in writing to the jury, pursuant to an inquiry by them, after they had retired from the courtroom and while they were in the jury room deliberating upon their verdict."

Holding that the accuracy of the instructions as abstract statements of the law was immaterial, the court said at page 823:

"The action of the trial judge in the present case in sending instructions to the jury from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present amounted to a denial of due process of law. We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given. The inquiry of the jury and the trial judge's response were not reported by the court stenographer. The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present."

It may be noted parenthetically that in **Arrington v. Robertson**, *supra*, we observed (at page 823) with reference to the Fillippon case:

“While the Supreme Court in the Fillippon case also pointed out that the additional instructions given were actually erroneous, its decision in the case appears to have been rested primarily on the manner in which the instruction was given.”

In the case of **Snyder v. Lehigh Valley Railroad Co.**, 245 F. 2d 112, decided June 5, 1957, by the United States Court of Appeals for the Third Circuit, involved an action for injuries sustained by a railroad employee under the Federal Employee's Liability Act. In that case the jury sent inquiry from the jury room asking whether the employee-plaintiff received workman's compensation. The judge should have stated to the jury in the presence of counsel that such was not an issue in the case, and the court's conduct in submitting a negative response, upon the erroneous assumption that plaintiff had injected such an issue in the case, without notice to or knowledge of counsel, was error with such strong possibilities of prejudice as to require reversal of judgment rendered for defendant, notwithstanding verdict finding neither party guilty of negligence but awarding plaintiff damages.

In its opinion, the court held that plaintiff's contention that the trial judge erred with respect to his supplementary oral instructions to the jury in the absence of counsel was supported by the decided cases. The court then went on to quote and cite with approval from **Fillippon v. Albion Vein Slate Co.**, *supra*; **Arrington v.**

Robertson, *supra*; and also cited with approval the case of **Parfet v. Kansas City Life Ins. Co.**, 10 Cir. 128 F. 2d 361, 362, certiorari denied 1942, 317 U.S. 364, where it was held that reversible error was committed even though substantial prejudice is not affirmatively shown, where additional instructions are given by the trial judge to the jury in the absence of their counsel. And the court also went on to say that in the case of **Fillippon v. Albion Vein Slate Co.**, *supra*, that the Supreme Court held that such instructions were presumptively injurious, furnishing ground for reversal unless it appears that they were harmless. The judgment of the District Court was reversed, with instructions to proceed in accordance with the opinion of the appellate court.

The case of **Ah Fook Chang v. United States**, 91 F. 2d 805 (C.A. 9th Cir. 1937) was a criminal case decided by this Court of Appeals, where the foreman of the jury came to the chambers of the trial judge for further instructions in the presence of counsel and in the absence of the clerk and court reporter, and the judge gave the foreman a further instruction. Thereupon, the foreman retired and a few moments later the jury returned to the court room with a verdict against both defendants on a narcotic drug charge.

At page 810 of the opinion this court says:

"The second ground of reversal is because of the communication by the court to the jury. It is

error for the court to instruct or communicate with the jury in the absence of counsel and without notice to them.”—(citing **Fillipon v. Albion Vein Slate Co.**, *supra*, and other cases).

“Not all error, however, is reversible error. If the record shows affirmatively that the appellant was prejudiced, there is reversible error. *Fillipon v. Albion Vein Slate Co.*, *supra*. On the other hand, if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal. * * * Finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal. *Little v. United States* (C.C.A. 10) 73 F. 2d 861, A.L.R., 220, Annotation.”

Continuing, from page 810, this court says:

“The instant case is not one where the whole jury was instructed directly by the court either orally or in writing. By instructing one juror to instruct the rest of the jury, the instruction was in fact given to the jury in the absence of appellants, their counsel and out of court, for the juror relaying the instruction would necessarily have done so in the jury room. On that theory reversal is required * * *. Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge’s instruction, the error would not be prejudicial. If he did not, the error may have been prejudicial. *Little v. United States* (C.C.A. 10 *supra*. * * * Presuming the error to be prejudicial, the rule in *Fillipon v. Albion Vein Slate Co.*, *supra*, is applicable and requires reversal.” Reversed and remanded for a new trial.

It will be seen from the facts involved and the foregoing authorities, that the trial judge in the case at bar in giving such supplementary instructions to the jury did commit error, and that such error is prejudicial and reversible, which is plainly shown by the context of the supplemental instructions. For example, when the court instructed the jury to the effect that they should be convinced and decide beyond a reasonable doubt, which is certainly conflicting with the court's original instructions which he gave the jury upon the theory of preponderance of the evidence. Such an instruction puts a greater burden upon the appellant than the law requires, which proposition I have set forth in a separate specification of error and will devote further argument thereto later in this brief. This is brought up merely for the purpose of illustration at this time in view of the holding of the Supreme Court in **Fillipon v. Albion Vein Slate Co.**, *supra*, and this court in the **Ah Fook Chang v. United States**, *supra*, cases.

SPECIFICATION OF ERROR NUMBER TWO

In connection with such supplementary instructions, the trial court erred in emphasizing and restating certain portions of the court's former instructions favorable to the appellee as to the non-liability of the appellee in this cause. (T. 202).

After further investigation and research upon the

foregoing proposition, appellant does not believe such point is well taken, and now waives same.

SPECIFICATION OF ERROR NUMBER THREE

That the trial court erred in failing to instruct the jury correctly as to the amount and measure of damages involved in this case, as requested by appellant in his requested instruction number VIII. (T. 17, 18). Said instruction number VIII is as follows:

VIII.

“If you find on the instructions given you, from a preponderance of satisfactory evidence, that Mr. Macartney, the plaintiff, is entitled to a verdict at your hands, and will award to him such an amount of money as will adequately compensate him for his injuries and damages, bearing in mind that the burden is on the plaintiff to establish by a preponderance of satisfactory evidence the nature and extent of his injuries and damages.

“In awarding damages, if any, you will take into consideration the nature and extent of his injuries, and which of such injuries are temporary or permanent in character, his pain and suffering endured, and which he will endure in the future, if any, as a proximate result of the accident; his mental anguish, if any, any future loss of earnings he will sustain resulting from this accident, and then allow plaintiff whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and within the confines of my instructions, not exceeding \$85,000.00, the

amount demanded by plaintiff in this case as general damages.

"In connection with this subject of damages you may also allow Mr. Macartney certain additional or special damages, if any, for reasonable expenditures incurred for medical and surgical care, hospitalization, for costs of X-Rays, and loss of earnings, as a longshoreman, if any, that Mr. Macartney sustained up to the time this case was tried, and then allow him whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and not exceeding the sum of \$9,963.40 claimed by Mr. Macartney as special damages in this case."

The trial judge instructed the jury (T. 173, 174, 175, 176) in regard to the measure of damages as follows:

"If you find, under the instructions that I have already given you, the plaintiff is entitled to recover, you will consider the question of damages. The fact that I am instructing you on the question of damages does not mean that I am or am not of the opinion that plaintiff is entitled to recover in this case because on that issue, while I am expressing no opinion one way or the other, I am going to leave it up to you to determine.

"Damages, like every other proposition, must be proved by a preponderance of the evidence on the part of the person having the burden of proof, and the plaintiff on that issue has the burden of proof. In assessing damages, you should take into consideration the injuries which the plaintiff has sustained, the pain and suffering which he has

endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should take into consideration any permanent disability which plaintiff has sustained as shown by the evidence, any loss of power in performing labor, any impairment of the ability to earn money considering his position and station in life — and generally, Ladies and Gentlemen, you should give him such amount as, under the evidence in this case, will reasonably compensate plaintiff for pain and suffering and injuries, past, present and future.

"Plaintiff contends that he has been permanently injured, and I think that the evidence is clear that he has sustained permanent injury and disability. If you find in favor of the plaintiff in this case, you can take into consideration his life expectancy. Plaintiff is 45 years of age, and, under the standard mortality tables, he has a life expectancy of 24.54 years. That is about 24½ years. The fact that he has this life expectancy does not mean that he will live that long, or that he will not live longer. Neither does it mean that he will be employed and earning during this entire period. However, it is one factor that you can take into consideration along with evidence of his age, sex, health, habits, and the nature of his occupation, to determine what his actual life expectancy will be. You will then take into consideration whether plaintiff's injuries permanently effect his ability to work or follow his occupation.

"He claims that as a result of his injuries he has lost \$8,000 in wages to date, and in the event you find in favor of plaintiff you may allow him

such sum as has been proved by the evidence, not exceeding the sum of \$8,000.

"He claims that he has spent \$1,989.04 for the reasonable value of medical and hospital expenses. If you find for him, he would be entitled to that amount as well.

"Your decision with reference to the amount of damages must be reached and founded upon an unprejudiced consideration of all the facts and without any sympathy, prejudice or desire to punish anyone, and without any thought of plaintiff's financial condition or the defendant's ability to pay.

"If you find that plaintiff, although entitled to recover, was guilty of some act of negligence which contributed to the accident, then you will reduce the amount of damages which you found in proportion to the negligence of the respective parties. For example, if you find that the plaintiff was contributorily negligent and that such negligence was responsible for 25 per cent of his accident and injuries, then you will reduce the amount of damages by 25 per cent, and you will award plaintiff 75 per cent of the recovery which you would have given him if he, himself, had not been guilty of negligence. Now this 25-per cent figure is just by way of example. If you find he was 50 per cent contributorily negligent, you would cut the damages in half. You would first find out what he would be entitled to if no negligence occurred on his part, and if he was 50 per cent negligent you would cut that award in half. If he was 25 per cent negligent you would give him three-quarters. If he was 75 per cent negligent you would only give him

one-quarter. That is the way you do that. The amount of damages which you put in the verdict is the amount plaintiff has and will sustain after the reduction, if any, and that will be the amount of your verdict. You do not put a full amount in the verdict if you find that he is guilty of contributory negligence. You put in an amount after the deduction, if any."

Appellant excepted (T. 179, 180, 183) to the failure of the trial judge to give such requested instruction as follows:

MR. CONWAY: "Your Honor, I think that maybe the Court overlooked the matter of instructing in connection with the amount of damage or the theory of damage involved here because, as I get the impression from your instructions, you spoke about \$8,000 as the money that the plaintiff lost up to the time of trial, and you had \$1,989.04, whatever it was, also hospital and doctor bills and what have you, and then I didn't hear you say anything about his future loss of earnings or how much damages the jury could allow him if they thought he was entitled to damages. I think we were suing for \$85,000 for general damages, for example, and then we had about \$8,000 special——"

THE COURT: "I said, 'In assessing damages, you should take into consideration the injuries plaintiff has sustained, the pain and suffering which he has endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should also take into account any permanent disability which the plaintiff has sustained as shown by the

evidence, and any loss of power in performing labor, any impairment of the ability to earn money, considering his position and station in life — and generally, Ladies and Gentlemen, you should give him such amount as, under the evidence in this case, will reasonably compensate plaintiff for pain and suffering and injuries past, present and future.'

MR. CONWAY: "Yes, that is right, Judge, but the thought I had in mind was this: I do not want you to misunderstand me. The jury might get the impression when you do not mention any sum there in that connection that they would have to find, for example, say for \$10,000.

THE COURT: "I will take care of that.

MR. CONWAY: "Because they might say——

THE COURT: "I will tell them."

THE COURT: "I want to call your attention once again to the verdicts.

"If you find in favor of plaintiff, you will put in that blank space the amount of damages to which you believe plaintiff is entitled, and in that figure you would put in the special and general damages. In other words, you cannot allow more than \$8,000 for loss of wages and more than \$1,989.04 for medical expenses. That is for the special damages. In addition to that amount, of course, you would allow him such sum as you believe plaintiff is entitled to for the pain and suffering and the injuries which he has sustained and about which I instructed you at considerable length. In that one figure

you take into consideration the general damages as well as the special damages, and then you reduce it by the amount which you find plaintiff has been guilty of contributory negligence."

ARGUMENT

Appellant contends that he is entitled to have a full and complete presentation of his claim and the theory of his case outlined to the jury by the trial judge in his instructions to the jury in the case at bar.

The case of **McDermott v. Severe**, 202 U.S. 600, 26 S.Ct. 709, 50 L.Ed. 1162 was an action to recover damages for personal injuries sustained by an infant who was run over at a railway crossing in Maryland, the railroad being in charge of the defendant, operating same as a receiver. A verdict and judgment resulted in favor of the plaintiff. Error was alleged in that the trial judge charged the jury that damages could not be recovered in excess of the sum claimed in the plaintiff's declaration, and that the sum claimed should not be taken as a criterion to act upon, but that it was only a limit, beyond which the jury could not go.

The Court of Appeals of the District of Columbia had affirmed the judgment of the lower court, and thereupon an appeal was taken to the United States Supreme Court. Among other alleged errors, which were overruled, the Supreme Court, in referring to the foregoing

instruction relative to the amount of damages involved said:

"We cannot see how the plaintiff in error (defendant receiver) was prejudiced by this instruction."

and affirmed the judgment of the Court of Appeals. 50 L.Ed. 1162, at 1169.

Chesapeake & Ohio Railway Company v. Carnahan, 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979, was a case in error to review a judgment in favor of the original plaintiff based upon a verdict for \$25,000 damages for injuries sustained through the asserted negligence of the defendant under the Federal Employers Liability Act. In its opinion, the Supreme Court, at 60 L.Ed. 981, says:

"The instruction which is the basis of the second assignment of error is as follows:

'The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of \$35,000, as to them may seem just and fair.' * * *

"It is objected that the instruction directed the jury that the damages might be in such sum not in excess of \$35,000 as to them might seem just

and fair. By the instruction the Court called the attention of the jury to a certain sum and gave judicial approval of it, giving them to understand that they could give such sum as they might deem just and fair, without regard to the damages the evidence might prove."

Continuing, in its opinion, at 60 L.Ed. 982, the Court says:

"Is is also objected that the instruction 'allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of \$35,000, and allowed the jury to give such sum as damages as to them might "seem just and fair" without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of'.

"The objection is untenable. As we have seen, the Court explicitly enjoined upon the jury that there must be a proximate and casual relation between the damages and the negligence of the company, and the reference to the sum of \$35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction."

The Court then affirmed the judgment of the lower court.

Hoffschlaeger Co. v. Fraga (1923; CCA9th) 290 F 146, was an action to recover damages for personal injuries resulting from a fall through an open elevator shaft in a public sidewalk on one of the streets of Hilo,

in Hawaii. The jury returned a verdict for the plaintiff, and a judgment was entered thereon, from which the defendant appealed to this Court of Appeals.

At 290 F, page 148, this Court says:

"Nor was there error in the charge of the court. The chief point of attack is to the statement in the charge that the amount of the verdict could not exceed the amount claimed in the complaint. Such an objection would seem frivolous were it not supported by some adjudged cases. The great weight of authority, however, is to the contrary. In many jurisdictions, the pleadings go to the jury room, but in any event, and whether they do or not, **the court must state the issues to the jury, and these are made up of the claims of the respective parties. As a matter of law, the verdict cannot exceed the amount claimed, and it is common practice to direct the attention of the jury to that fact.** But why should the jury be influenced by the amount claimed by the plaintiff, any more than by any other claims advanced by the parties? Such claims are not evidence, and it is an insult to human intelligence to say that they are likely to mislead or otherwise influence the jury.

"We find no error in the record, and the judgment is therefore affirmed."

SPECIFICATION OF ERROR NUMBER FOUR

That the trial court erred in his supplemental instructions to the jury by instructing the jury to the effect they should be convinced and decide beyond a reasonable doubt which is confusing and conflicting with his

original instructions which he gave upon the theory of preponderance of the evidence, and puts a greater burden upon appellant than the law requires.

The trial judge in his original instructions to the jury said:

"Therefore, if you find from a **preponderance of the evidence** that the defendant breached its duty to provide a seaworthy ship and appliances and that, as a result of that breach, the plaintiff suffered injury, then the defendant is liable to the plaintiff" (T. 164, 165).

"The plaintiff has the burden of proof to establish this breach of duty because the law presumes that the defendant has performed all the duties incumbent upon it, and plaintiff, in order to prevail, must establish by a **preponderance of the evidence** that the defendant has not carried out those duties. (T. 165).

"**Preponderance of the evidence** means the greater weight of the evidence. Now the greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you give the witnesses or by reason of other evidence that has been introduced." (T. 165).

"You have heard the evidence, and it will be up to you to determine whether the plaintiff has proved by a **preponderance of the evidence** that the defendant was

guilty of negligence in either particular, using the standard of reasonable care that I have outlined for you. (T. 167).

"The plaintiff has the burden of proving by a **preponderance of the evidence** the charges upon which he relies. However, it is not incumbent upon him to prove both of these specifications under either the theory of unseaworthiness or under the theory of negligence. If he has proved either one of them by a **preponderance of the evidence**, you will then determine whether such unseaworthiness or such negligence was a proximate cause of plaintiff's accident and injury." (T. 167).

The trial judge in his supplemental instructions (T. 187, 188) to the jury said:

"I think I told you before that I do not expect anyone to surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or solely for the purpose of returning a verdict. I do not think a person should do that; however, I think I told you just before the conclusion of my remarks that it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors, and in the course of your deliberations you should not hesitate to change your

opinion when convinced that it is erroneous. In order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to, and regard for the opinions of the other jurors. That is to say, in conferring together each of you should pay due attention and respect to the view of others and listen to each other's arguments with a disposition to re-examine your own views. If much the greater number of you are for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict.

"On the other hand, if a majority or even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt."
(T. 188).

ARGUMENT

In **Williams v. Portland General Electric Co.** (1952)

195 Or. 597, 247 P. 2d 494, in a case for damages for death under the Oregon Employers Liability Act, the trial judge gave misleading and inconsistent instructions to the jury, which brought in a verdict for the defendant. The trial judge set aside the verdict and judgment entered thereon and allowed a new trial, and the defendant appealed.

The Oregon Supreme Court, in its opinion, 195 Or. 610, says:

"Misleading and inconsistent instructions are frequently deemed ground for new trials or reversals. * * * (citing many cases).

Continuing, the court further says:

"The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of the instructions should be to enlighten and to acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are ground for a reversal or a new trial. * * * For the reasons above stated, the challenged order of the Circuit Court is affirmed."

Eid v. Larson, et ux., (1953) 200 Or. 83, 264 P. 2d 1051, was an action by a passenger in an automobile

for personal injuries sustained in a collision. The jury returned a verdict for the defendants, and a judgment was entered for defendants. The plaintiff appealed.

The trial judge erroneously instructed the jury that plaintiff could not recover if the driver of the automobile in which she was riding was negligent. Such an instruction went directly to the question of defendant's liability. In another part of the instructions the trial judge correctly instructed the jury that the negligence of the driver of the car could not be charged to plaintiff.

The Oregon Supreme Court, in its opinion, at page 86, says:

"The instruction to which exception was taken and the instruction last referred to were inconsistent. Generally, inconsistent instructions require a reversal. * * * Since the erroneous instruction went directly to the question of defendant's liability, the error cannot be disregarded. * * *"

"Counsel clearly made the point of his exception when he said that the instruction was contrary to the law because 'Ellen Eid is not chargeable with any negligence of Arlie (the driver).' Reversed.

In **Rea v. Missouri ex rel Hayes**, 17 Wall 532, 21 L. Ed. 707, the Supreme Court held that instructions of the lower court, which were calculated to mislead the jury as to the character of the evidence necessary to make out the charge of fraud and to prove the issue

on the part of the defendant, were erroneous, and reversed the judgment and ordered a new trial.

In **Deserant v. Cerillos Coal Railroad Co.**, 178 U.S. 409, 20 S.Ct. 967, 44 L.Ed. 1127, the court holds that instructions as to the duty of a mine owner with respect to ventilation of the mine and keeping it clear from standing gas are erroneous, when they are so inconsistent with other instructions that they tend to confusion and misapprehension, and then make his duty **relative instead of absolute**, as required by the Act of Congress of March 3, 1891, **making the test what a reasonable person would do, instead of the command of the statute**. The court then reversed the judgment based upon a verdict, and remanded the case for a new trial.

In **Kempf v. Himsel**, 98 N.E. 2d 200, 212, 121 Ind. App. 488, the court explains that the term "beyond a reasonable doubt" in a criminal case and a "fair preponderance of evidence" in a civil case are wholly different and recognize distinguishable degrees of burdens of proof, and the duty of establishing a fact "beyond a reasonable doubt" imposes a duty far greater than to establish the same fact by a fair preponderance.

In a case decided by this Court of Appeals in 1943, **Northwestern Electric Co. v. Federal Power Commission**, 134 F. 2d 740 at 743, from the opinion, this court says:

“(2) ‘Burden of proof’ in the sense of ‘persuasion’ is meaningless unless it is also said how strongly a person must be persuaded. For example, if it is said that a person must be persuaded by not less than a ‘preponderance of evidence,’ it is meant that such evidence is ‘evidence of greater convincing force.’ * * * In criminal cases, proof of guilt must be ‘beyond a reasonable doubt,’ which implies a still greater degree of proof. It is one thing to be merely convinced of a fact, and another to be convinced beyond a reasonable doubt.”

SPECIFICATION OF ERROR NUMBER FIVE

A. That the trial court erred in his supplemental instructions to the jury by incorrectly stating the law as to the test of seaworthiness by instructing as follows:

“The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances.” (T. 191).

B. Such instruction is also confusing and conflicting with the Court’s original instructions which he gave regarding seaworthiness and a test for seaworthiness. (T. 191, 163, 164).

In his original instructions (T. 163, 164, 165) the trial judge told the jury:

“I instruct you that it was the defendant’s duty as the operator of said vessel to furnish plaintiff with a seaworthy vessel and safe and proper appliances in good order and condition. This duty which was imposed upon the defendant was not

delegable. In other words, this duty cannot be passed on by contract, or any other method, and merely because Oregon Stevedoring Company was charged with the responsibility of loading the vessel does not relieve the defendant of its obligation to furnish a seaworthy vessel with safe and proper appliances in good order and condition. Likewise, knowledge or due diligence on the part of the defendant is immaterial in so far as seaworthiness is concerned for a ship is under the absolute duty to furnish a seaworthy ship and appliances, but a seaworthy ship and appliances does not mean that the defendant was required to furnish a perfect ship or perfect appliances, for the standard of seaworthiness is not perfection but reasonable fitness.

"With reference to the first claim of unseaworthiness, in which it is claimed that the ship permitted the use of an unsafe and unseaworthy dolly, you have heard the evidence and I have already instructed you that it was the responsibility of the defendant to furnish a seaworthy ship with safe and proper appliances which were in good order and condition. You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evidence that the dolly upon which the crate of glass was placed was in an unseaworthy condition. That is the burden of the plaintiff. He must show that the dolly in question was unsafe and unseaworthy.

"With reference to the claim that too much cargo was unloaded from one part of the ship, and as a result the ship was caused to lurch, careen, tilt, slant, lean and heel over, you are instructed

that a test as to seaworthiness is whether in hull and gear the particular vessel was reasonably fit for the purposes of her voyage at that particular time.

"Therefore, if you find from a preponderance of the evidence that the defendant breached its duty to provide a seaworthy ship and appliances and that, as a result of that breach, the plaintiff suffered injury, then the defendant is liable to the plaintiff."

ARGUMENT

As set out in subdivision A of this specification of error, the trial judge was in error as to the test for seaworthiness he gave the jury in his supplemental instructions as stated **because he included the element of negligence in such test as to what a reasonably prudent person would have done under all the circumstances.**

In **Seas Shipping Co. v. Sieracki**, which involved personal injuries to a stevedore, 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872, the Supreme Court holds that "**unseaworthiness is a species of * * * liability without fault**, which is different than negligence." The Sieracki case was reaffirmed again in **Pope & Talbot, Inc. v. Hawn**, 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202. **Petterson v. Alaska S. S. Co.**, (9th Cir.) 205 F. 2d 478, 347 U.S. 396, 98 L.Ed. 798, 74 S.Ct. 601 is to the same effect.

The case of **Deserant v. Cerillos Coal Railroad Co.**, 178 U.S. 409, 20 S.Ct. 967, 44 L.Ed. 1127, *supra*, which

is referred to in Specification of Error Number Four, is also very pertinent to the proposition involved under Subdivision A of this Specification of Error for the reason that in the Deserant case, the trial judge erroneously instructed the jury as to the duty of a mine owner with respect to ventilation of the mine and keeping it clear from standing gas in such a way as to be inconsistent with other instructions of the court so that all the instructions tended to confusion and misapprehension and also made the duty of the mine owner relative instead of absolute as required by the Act of Congress involved, thus making the test of what a reasonable person would do instead of the command of the statute. The Supreme Court reversed the lower court and remanded the case for a new trial.

Moreover, as pointed out in subdivision B of this particular specification of error number five, such an instruction is also confusing and conflicting with the trial judge's original instructions that he gave regarding seaworthiness and a test for seaworthiness.

Such a confusing and conflicting instruction is prejudicial error and ground for reversal, as pointed out in appellant's argument under Specification of Error Number Four in this brief, which we adopt and refer to under this specification of error for the sake of brevity.

CONCLUSION

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and to expedite matters, that this Court of Appeals should determine as a matter of law that appellee is guilty of negligence and unseaworthiness as charged by appellant.

The recent case of **Johnson Line v. Maloney**, 9th Cir., April 9, 1957, 243 F 2d 293, illustrates the proposition that where the complaint alleged both unseaworthiness of the vessel and negligence on the part of the defendant (and an unsafe place to work, as in the case at bar) that the court would be warranted in finding against the ship on grounds of either negligence or of unseaworthiness or of both. This Court of Appeals went on to say in its opinion, in referring to another case, that the shipowner owed not only the duty to provide a seaworthy ship in which the stevedore might work, but it owed him as a business visitor or invitee the duty to provide a reasonably safe place to do his work. "This duty," said the court, "is nondelegable." (243 F 2d 293, at 294).

This case should then be reversed and remanded for a new trial only for the purpose of determining the amount of damages sustained by appellant resulting from the accident involved in this case, or if this Court

of Appeals decides that it cannot follow the foregoing procedure, then that the judgment appealed from should be reversed and this case remanded for a new trial in all respects, with costs to appellant in both courts.

Respectfully submitted,

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No. 15,667

IN THE

United States Court of Appeals
For the Ninth Circuit

LORENZO WHITE, JOYCE HARPER and
RUBY FIELDS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

GEORGE M. YEAGER,
United States Attorney,

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Attorneys for Appellee.

FILED

DEC 27 1957

PAUL P. BRIEN, CLERK

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Appellee.

On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

In December, 1955, Lorenzo White operated the Morocco Club, a bar, located in South Fairbanks.

Joyce Harper and Ruby Fields worked at the Club as hostesses (TR 41) and were close friends. White and Harper were living at 721 16th Street in a house which White owned.

On December 11, 1955, Ruby Fields left Fairbanks, Alaska, by plane and arrived in Los Angeles, California, on the 12th, after which she went directly to her mother's house (TR 185).

On December 14, 1955, Robert Thompson, a Deputy United States Marshal, requested the Postmaster, Mrs. Boyle, to look for a package mailed from Los Angeles to a fictitious person in Fairbanks. He further stated to her that it probably would be picked up by a cab driver (TR 45). On December 15 Mrs. Boyle examined all the parcels that came from Los Angeles and selected an insured one which had a fictitious name, Myrtle Hicks, as addressee. A telephone call was made to the Postal Inspector in Charge at Seattle. After ascertaining its character as fourth-class mail, Mr. Brady, a District Operation Manager of the Postal Department, authorized the Postmaster to open the package (TR 84). Mrs. Boyle then opened the package, which contained a light blue garment and a gelatin-like envelope with white powder. The garment had a cleaning tag on it with the letters "Fiel". Mrs. Boyle testified that the package had to be fourth-class mail to be insured. She examined the meter strip on the package and the postage was \$2.60. If the postage was \$2.60, the package would weigh three pounds, which at eighty cents a pound would be a total of \$2.40 plus twenty cents for the insurance fee. The

package was then sealed and placed in the general delivery mail.

On December 15 Willie Stanton, a cab driver, received a call to go to 721 16th Street, where Lorenzo White and Joyce Harper lived. Harper asked him to pick up the mail and some dog food. She also gave him a note with the name Myrtle Hicks written on it which he was to present at the Post Office when he called for the mail. On December 16 William Taylor, another cab driver, was sent to purchase a pair of stockings and to call for a package at the Post Office for Myrtle Hicks. He was attempting delivery of the stockings and looking for 731 16th when a colored girl in a red house motioned for him. He delivered the stockings to her and advised there was no mail and that there was a package but it hadn't been brought up from the back yet (TR 100). The next day he received a call to pick up a package for Myrtle Hicks and deliver it to Jenkins.

On December 17 Lorenzo White talked with Jenkins, a taxi driver, at 721 16th, and asked him to pick up a package at the Post Office addressed to Myrtle Hicks at 731 16th. Jenkins received the package from Taylor, but upon delivering it at 721 16th, he told Joyce Harper that there were some officers with him. This conversation was in a low tone of voice so no one but she could hear it (TR 108).

Briggs J. White, a chemist and toxicologist for the Federal Bureau of Investigation Laboratory in Washington, D. C., analyzed the white powder in the glas-

sine envelopes and determined it to be the narcotic, heroin.

Mr. Latona, a fingerprint examiner for the Federal Bureau of Investigation, found four latent prints of the appellant Fields on the glassine envelopes.

Mrs. James, supervisor of Sani System Cleaners in Fairbanks, identified the ticket on the dress as their ticket.

Fields was arrested at Los Angeles, California, on December 27, 1955, by Treasury Agents Goodman and Carpenter (TR 183-184).

After the government had rested its case, the appellant Fields took the stand and testified that she sent the package, but denied that her associates had anything to do with it.

An indictment was returned by the grand jury on February 15, 1956, and a superseding indictment was returned on May 25, 1956, charging the appellant Fields in Count I with transportation of a narcotic drug; Count II importation of a narcotic drug; Count III conspiracy; Count VI mailing a poisonous drug; Count VII conspiracy (TR 3-9). The other appellants were also indicted on all counts except Count VI. On May 6, 1957, trial commenced in the District Court for the District of Alaska, Fourth Judicial Division, and on May 9, 1957, the jury returned a verdict of guilty as to all counts upon which the appellants were indicted.

Judgments were entered on June 6, 1957, wherein the appellants were sentenced to five years on Counts

I, II, III and VII, the sentences to run concurrently. Fields received a sentence of two years on Count VI to run concurrently with the other sentences. Motion for a new trial was filed on May 14, 1957, and was denied. Appellants filed a notice of appeal on June 11, 1957.

QUESTIONS PRESENTED.

Whether appellants' motion to suppress the package containing the heroin was timely made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

Whether appellants had the right to have Exhibits D, E and G suppressed when the exhibits were not seized and without their claiming an interest or right in them.

Whether the Court erred in admitting the package and heroin, Exhibits F, H, I, J and K.

ARGUMENT.

I.

APPELLANTS FAILED TO MAKE A TIMELY MOTION TO SUPPRESS THE PACKAGE PURSUANT TO RULE 41(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

On May 25, 1956, the indictment in this case was returned by the grand jury. On August 27, 1956, the appellants entered pleas of not guilty to the charges and the trial commenced on May 6, 1957. During this year no motion to suppress the heroin was made.

Rule 41(e) of the Federal Rules of Criminal Procedure provides that the motion shall be made before the trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, . . .

Since the above Rule uses the word shall, it would appear that a timely motion must be taken to secure a judicial determination of claims of illegality on the part of agents of the government in obtaining evidence.

The appellant Fields knew that the government had possession of the package (TR 185, 186), and the indictment describes the package with such particularity as would be impossible without the government having seized it.

The record does not show any reason why the appellants did not make the motion prior to trial or earlier in the trial, especially after the Deputy United States Marshal and the Postmaster had testified. Now, on appeal after discovering their waiver, counsel simply state in their brief that no opportunity was given to so move before their first objection. The appellants were adequately represented by counsel as both Mr. Hepp and Mr. McNealy were former United States Attorneys.

This Court in *Rose v. U.S.*, 149 F. 2d 755, 760 (9th Cir. 1945), stated, "Objection to the use of the tires as evidence was made for the first time when they were offered into evidence, more than seven months after they were seized, and again on motion for arrest of judgment. The point was not seasonably raised,

even assuming the search and seizure illegal, and therefore must be considered waived.” See *Segurola v. U.S.*, 275 U.S. 106, 112 (1927); *Peters v. U.S.*, 97 F. 2d 500, 502 (9th Cir. 1938); *U.S. v. Salli*, 115 F. 2d 292 (2nd Cir. 1940); *Sandez v. U.S.*, 239 F. 2d 239, 242 (9th Cir. 1956).

Appellants rely on *Gouled v. U.S.*, 255 U.S. 298 (1921), but in that case the defendant had moved to suppress the evidence in advance of the trial and then the same objection was raised at the time of trial. However, the Court did state on page 305 of the opinion that an objection was not too late where the papers had been taken by an acquaintance in his absence and the defendant did not know that the papers had been taken until the acquaintance appeared on the witness stand.

II.

THE APPELLANTS DID NOT HAVE THE RIGHT TO HAVE EXHIBITS D, E AND G SUPPRESSED AS EVIDENCE ON THE GROUNDS OF ILLEGAL SEARCH AND SEIZURE.

Exhibit D (TR 128), government’s identification 6 (TR 53, 55), was the wrapper from the transmittal box which was sent to the FBI Laboratory. Robert Thompson, the Deputy United States Marshal, prepared this wrapper so the package containing the narcotics, which was inside the box, could be mailed to the experts for examination.

Exhibit E (TR 129, 130), government’s identification 4 (TR 54), was the box which Mr. Thompson

used to send the package, which contained the heroin, to the FBI Laboratory, and the same box was returned to the United States Marshal after the examinations were made.

Exhibit G (TR 131, 132), government's identification 11 (TR 90), was the outside wrapper from the box which special agent Briggs J. White sent air express to Mr. Dorsh, the United States Marshal at Fairbanks, Alaska, after they had completed their examination of the package and its contents.

These exhibits were offered and admitted for the purpose of showing a chain of evidence from the time the package was received from the Postmaster until introduced at the trial. None of these exhibits were ever in the possession of the appellants. At the time the objections were made, they did not claim an interest or right to them. The burden was on the appellants to prove to the trial Court the facts necessary to sustain their objection. *Nardone v. U.S.*, 308 U.S. 338, 341 (1939).

The Tenth Circuit held in *Wilson v. U.S.*, 218 F. 2d 754, 756 (10th Cir. 1955), "The law is well settled that the protection of the Fourth Amendment to the Constitution against unreasonable search and seizure is personal to the one asserting it, and one who claims no proprietary or possessory interest in that which has been seized as a result of a search may not object to its introduction in evidence." See *Accardo v. U.S.*, 247 F. 2d 568, 569 (U.S. App. D.C. 1957). Since there was no search and seizure of these exhibits and the

appellants did not claim an interest in them, the Court did not err in their admission.

III.

THE COURT DID NOT ERR IN ADMITTING EXHIBITS F, H, I, J AND K.

Exhibit F (TR 131), government's identification 1, was the wrapper and cardboard box that contained the heroin and dress. Exhibit H (TR 114), government's identification 3 (TR 51), was part of the dress that was inside the package. Exhibit I (TR 135), government's identification 2 (TR 51), was the other part of the dress. Exhibit J (TR 157), government's identification 15 (TR 155), was the two glassine envelopes which were in the package wrapped in the fold of the dress. Exhibit K (TR 159), government's identification 14 (TR 155), was the box containing the heroin which had been removed from the glassine envelopes. All of these exhibits made one package, which was opened by the Postmaster and the District Operation Manager of the Postal Department. They had previously called the Postal Inspector in Charge at Seattle and verified that the package was fourth-class mail and it could be inspected (TR 72, 84). The postage on the meter stamp was \$2.60 (TR 76). The above exhibits have been forwarded as part of the record to this Court. Just by examining the exhibits, this Court will at once recognize the fact that the package weighed over eight ounces. The Postmaster testified that if the postage was \$2.60, it probably

weighed three pounds at eighty cents a pound, which would be \$2.40, and possibly twenty cents for the insurance (TR 76). This testimony is consistent with the statute on air parcel post service, 39 U.S.C.A. 475 (8). This package was insured, and only third- and fourth-class mail may be insured, 39 C.F.R. 52.1(b). This package weighed over eight ounces, so it could not be third-class mail, 39 C.F.R. 24.3.

Congress has provided for postage on such packages, 62 Stat. 1097, 39 U.S.C.A. § 475:

“Air parcel-post service; rates; rules and regulations; adjustment of weight limits, zones, and rates, etc. The rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air-mail routes, shall, except as otherwise provided in this section, *be determined on the basis of the eight postal zones established for fourth-class matter*, as follows:
 . . .”

In any event, as already pointed out, the package here was not matter bearing first-class or letter postage, but fourth-class mail upon which fourth-class postage was paid.

The Court in the case of *Oliver v. U.S.*, 239 F. 2d 818, 822 (8th Cir. 1957), commented as follows, “At the time of the Jackson decision, there existed a statute, 17 Stat. 301, 39 U.S.C.A. § 251, not directly related to the situation involved in the case and for that reason presumably not referred to in the general discussion of the opinion, which provided that ‘Post-

masters at the office of delivery may remove the wrappers and envelopes from mail matter not charged with letter postage, when it can be done without destroying them, for the purpose of ascertaining whether there is upon or connected with any such matter anything which would authorize or require the charge of a higher rate of postage’.”

Although this statute was not applicable in their fact situation because the Court found the package to be first-class mail, this Court should consider it pertaining to this package which was fourth-class matter and was not charged with letter postage.

39 U.S.C.A. 243 provides all matter of the fourth-class shall be subject to examination. An examination of the authorities does not disclose a case in point. However, the Sixth Circuit in the case of *Webster v. U.S.*, 92 F. 2d 462 (6th Cir. 1937), held in a per curiam opinion as follows: “The Court being of the opinion that inspection by the Post Office Department of an unsealed package not having upon it stamps sufficient to qualify it as first class mail was not an invasion of appellant’s immunity from unreasonable search and seizure, . . .”

From every indication in the *Oliver* case, if the package had weighed eight and one-half ounces, it would have been sent air mail parcel post, and as the opinion apparently recognized (page 823, fn. 3) there would have been no question as to the authority of the postal authorities to inspect the package.

In *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), the Supreme Court stated, “In their enforcement, a dis-

inction is to be made between different kinds of mail matter—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; . . .” Although the above appears to be dicta, the Eighth and Tenth Circuits have followed it as precedent in deciding the illegality of a search of first-class mail on which letter postage has been paid. However, there appears to be no reason why this Court should extend the *Jackson* case to cover other classes of mail on which letter postage is not paid.

Appellants also urge this Court to declare 39 U.S.C.A. 243; 700 unconstitutional, evidently on the authority of *Ex Parte Jackson*. These statutes are not in conflict with that opinion because letter postage is not paid on fourth-class matter.

CONCLUSION.

It is respectfully submitted that the judgments entered by the District Court should be affirmed.

Dated, Fairbanks, Alaska,
December 13, 1957.

GEORGE M. YEAGER,
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(Appendix Follows.)

Appendix.

Appendix

IDENTIFICATIONS AND EXHIBITS.

Identification	Identified	Exhibits	Received
Government's 6	TR 55	D	TR 128
Government's 4	TR 53	E	TR 130
Government's 1	TR 50	F	TR 131
Government's 11	TR 90, 131	G	TR 132
Government's 3	TR 51, 132, 133	H	TR 134
Government's 2	TR 51, 134	I	TR 135
Government's 15	TR 155	J	TR 157
Government's 14	TR 155	K	TR 159

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41(e). *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The

motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing.

CODE OF FEDERAL REGULATIONS.

39 § 24.3. *Weight and size limitations*—(a) *Weight*. The weight of each addressed piece may not exceed 8 ounces, except letters for the blind (See Part 28 of this chapter).

39 § 52.1(b). *Classes of mail to which applicable*. You may insure only third- and fourth-class mail. The mail must bear the complete names and addresses of sender and addressee. The following are not acceptable for insurance:

UNITED STATES CODE ANNOTATED.

39 § 251 (17 Stat. 301). *Same; removing wrappers*. Postmasters at the office of delivery may remove the wrappers and envelopes from mail matter not charged with letter postage, when it can be done without destroying them, for the purpose of ascertaining whether there is upon or connected with any such matter anything which would authorize or require the charge of a higher rate of postage thereon.

39 § 475 (62 Stat. 1097). *Air parcel-post service; rates; rules and regulations; adjustment of weight*.

limits, zones, and rates, etc. The rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air-mail routes, shall, except as otherwise provided in this section, be determined on the basis of the eight postal zones established for fourth-class matter, as follows:

39 § 243. *Same; disposition of nonmailable matter.* All matter of the fourth class shall be subject to examination. If any matter excluded from the mails by section 240 of this title, except that declared nonmailable by section 334 of Title 18, shall, by inadvertence, reach the office of destination, the same shall be delivered in accordance with its address. The party addressed shall furnish the name and address of the sender to the postmaster at the office of delivery, who shall immediately report the facts to the Postmaster General. If the person addressed refuse to give the required information, the postmaster shall hold the package subject to the order of the Postmaster General. All matter declared nonmailable by section 334 of Title 18, which shall reach the office of delivery, shall be held by the postmaster at the said office subject to the order of the Postmaster General.

39 § 475(8). For air parcels exchanged between offices in continental United States and offices in Territories and possessions of the United States, in either direction, and between offices within such Territories and possessions, the applicable zone rate shown

in paragraphs (1) to (6) of this section shall apply to and including the seventh zone: *Provided*, That for offices falling in the eighth zone the rate of postage for air parcels weighing in excess of eight ounces shall be 80 cents for each pound or fraction thereof.

39 § 700. *Searches authorized.* The Postmaster General may, by a letter of authorization under his hand, to be filed among the records of his department, empower any post-office inspector or other officer of the Post Office Establishment to make searches for mailable matter transported in violation of law; and the inspector or officer so authorized may open and search any car or vehicle passing, or having lately before passed, from any place at which there is a post office of the United States to any other such place, or any box, package, or packet, being, or having lately before been, in such car or vehicle, or any store or house, other than a dwelling house, used or occupied by any common carrier or transportation company, in which such box, package, or packet may be contained, whenever such inspector or officer has reason to believe that mailable matter, transported contrary to law, may therein be found.

No. 15,667

United States Court of Appeals
For the Ninth Circuit

LORENZO WHITE, JOYCE HARPER and
RUBY FIELDS,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

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No. 15,667

United States Court of Appeals For the Ninth Circuit

LORENZO WHITE, JOYCE HARPER and
RUBY FIELDS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

JURISDICTION.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, Section 4, 31 Statutes 322 as amended (48 U.S.C.A. Section 101). The jurisdiction of the Court of Appeals rests on Sections 1291, 1294 of 28 U.S.C., and the Federal Rules of Criminal Procedure.

JUDGMENT BELOW.

Judgment was entered in the District Court at Fairbanks, Alaska, on the 6th day of June, 1957,

against Appellants (TR 18-20-22), based upon verdicts rendered by the jury (TR 12-13-14) on the 9th day of May, 1957. Motion for judgment notwithstanding the verdict and motion for new trial (TR 15) was denied June 3, 1957 (TR 16).

STATEMENT OF FACTS.

The Appellants herein were indicted in a Superceding Indictment (TR 3) by the Grand Jury for the Fourth Division, District of Alaska, on the 25th day of May, 1956, as follows:

Count I—that said Appellants did feloniously send, ship, carry and deliver Heroin, from the State of California to the Territory of Alaska, with Appellants White and Harper having aided and abetted the mailing of the package in violation of Section 4724(b) of the Internal Revenue Code of 1954.

Count II—that said Appellants knowingly transported a narcotic drug, to-wit, Heroin which had been imported into the United States contrary to law by Ruby Fields having mailed the package to the Fairbanks Post Office and the other two Appellants having aided and abetted the mailing and delivery in violation of Section 2 of the Narcotics Drug and Import Act, being the act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. 174.

Count III—alleges a conspiracy between Appellants and others.

Count IV—alleges that Ruby Fields deposited the Heroin for mailing from California to Fairbanks,

Alaska, contrary to Title 18, U.S.C.A. Section 1716, regarding the mailing of poisonous drugs.

Count V—charges Appellants with conspiracy to mail a poisonous drug under Title 18 U.S.C.A. 371.

The government charged that the package containing the heroin and the heroin itself was the property of the Appellants herein. No direct opportunity to deny this was afforded the appellants either before, or until nearly the end of the trial.

Appellants at no time prior to trial claimed the package (TR 46) and were therefore not in position to move for its suppression as evidence. The earliest opportunity arose when the government offered a part of the package into evidence (TR 125). At (TR 127) Mr. Hepp for the then defendants stated "I submit to the Court that even Congress can make no law allowing the opening of packages or mailing matter for an unlawful search." And at (TR 128) the Court stated "it will be understood that this one objection was lodged against each and all of the Identifications."

At (TR 139) Mr. McNealy moved for the exclusion of the package and all items it contained because there had been an unlawful search and seizure without a warrant.

The testimony of government witness, Robert Thompson, a U. S. Deputy Marshal (TR 44-48) clearly shows that it instructed the Fairbanks Postmaster to be on the lookout for a certain package, and when the package did arrive he went to the

office of Mrs. Boyle, the Postmaster and the package containing the heroin was opened in his presence and that of the U. S. Marshal, Mr. Dorsch, and without a warrant.

Mrs. Boyle also testified to manner in which the package was opened (TR 72-73). No positive proof as to the weight of the package could be given by Mrs. Boyle who stated a mere conclusion that "if the postage was \$2.60, it probably weighed about three pounds at 80¢ a pound and possibly 20¢ insurance fee. She stated that it had to be fourth class mail to be insured (TR 76). At (TR 71) it was established this package arrived by way of airmail.

At (TR 146) Mr. McNealy for Appellants again raised the issue of having to move to suppress evidence not claimed by any party in order to protect the record. Also put in issue was the unlawful bringing in of Federal Marshals to open mail without a warrant and if the Post Office has the right to search a package the right is not also extended to U. S. Marshals or other government officials.

At (TR 155) Mr. Hepp moved to suppress evidence, again at (TR 157) and again as to the heroin (TR 159).

Mr. Hepp moved for a directed verdict of acquittal and argued at length on the failure of the government to prove a conspiracy involving Lorenzo White or Joyce Harper (TR 203-216).

At (TR 216-217) Mr. McNealy again urged the unlawful search despite no admission that the package belonged to any of the defendants.

At (TR 218) the Court denied the motions for judgment of acquittal which we assume also disposes of the motions to suppress evidence.

The surprise feature came the closing afternoon of the trial when Appellant, Ruby Fields took the stand as what had been planned to be the first defendant to testify. At (TR 221-223) Ruby Fields admitted to ownership of the package and the heroin and to its mailing, but denied the other then defendants were implicated with her.

At (TR 234) Mr. McNealy again moved to suppress Exhibits F, I, H, E, D, G, J and K, being the package in dispute and its contents. The motion was denied.

EVIDENCE.

This cause evolves around a package containing, among other things, heroin, mailed from Los Angeles, California, by the Appellant Ruby Fields to a Myrtle Hicks in Fairbanks, Alaska. Miss Fields stated the heroin was for her own use and certainly no commercial quantity was discovered, there being only 7.65 grams of the heroin (TR 158).

The package containing the heroin consisted of Exhibits D, E, F, G, H, I, J and K.

Nowhere is there any evidence that Appellants, White and Harper knew that the package contained heroin, even if the testimony of the cab drivers Clyde Jenkins (TR 103), Willie Stanton (TR 90) and William Thomas Taylor (TR 98) is accepted as true and convincing evidence.

As stated by Mr. Hepp for the then defendants (TR 203-216), the case was made by basing one presumption on to another by the government to secure conspiracy convictions.

Again it should be noted the handicap under which defense counsel labored in the lower court in not learning until the closing day of the trial of the ownership of the heroin so that a more timely motion to suppress could have been made.

The question and evidence to be considered is whether or not the airmail package which was searched and seized without a warrant is admissible. Certainly the evidence of the Postmaster Mrs. Boyle at (TR 76) cannot be given any other status than a mere conclusion.

The question still remains—whether this was a first class airmail package or a fourth class airmail package. In either event the appellants allege that their constitutional rights were violated by the unlawful search and seizure.

It is important, before argument, that a narration of events be included here.

Why the failure of the U. S. Marshal to secure a search warrant and legally seize the package containing the heroin instead of causing the same to be searched in the Fairbanks Post Office?

Robert Thompson (TR 44) testified he had requested the Postmaster to see if she "could locate this package in the mail". This was done in his then capacity as a U. S. Deputy Marshal. He told Mrs.

Boyle, the Postmaster, the type of package to look for (TR 45).

On December 16, 1955, Mrs. Boyle notified Thompson the package was there and the package was opened in her office with four persons being present, namely: Thompson, Boyle, Brady (TR 46) and Mr. Dorsch, the U. S. Marshal for the Fourth Division, Alaska.

After examination by the Marshals and the Postmaster, the package was left with the Post Office and returned to the General Delivery window (TR 52). Thompson stated he did not see the package again until he picked it up with a search warrant on December 20th. See also testimony of Mrs. Boyle (TR 71-76).

Theodore McRoberts (TR 85, et seq.) testified that he was a U. S. Deputy Marshal, first saw the package on December 17, 1957, while on watch for the same in the Post Office; that he saw a William Taylor receive the package and then took Taylor and the package to the Marshal's office. Later in company with Taylor, a cab driver, they took the package containing the heroin to a Clyde Jenkins in Taxi No. 15. McRoberts then entered the cab with Jenkins and the package and tried to deliver it and failed, returned to the Federal Building, went to a different address (TR 88-89) and Mr. McRoberts again returned the package to Mrs. Boyle at the Post Office.

All these shenanigans took place without an arrest being made and without procuring a search warrant. It was not until all efforts to deliver the package to

someone had failed that belatedly, and on December 20, 1957, that the U. S. Marshal procured a search warrant and seized the package that was apprehended, opened, searched and seized without a warrant in the period between December 16th and 20th.

ARGUMENT.

For the purposes of this brief, appellants will divide and argue the Statement of Points on Appeal (TR 37) as follows:

CONSPIRACY QUESTION.

Points 2, 3 and 6 will be considered in one argument. These embody a charge of error to the lower court in denying motions for acquittal at the close of the government's and defendant's case, and with reference to the conspiracy portion of Point 6.

These will not be urged in this Brief but are mentioned to allow counsel to argue these points on the hearing on appeal.

CONSTITUTIONAL QUESTION.

Points 1, 4, 5, a part of 6, and 7 will be considered herein as the actual basis for urging that lower court's judgment be reversed. We do not consider these points in the order of their listing.

Points 4 and 5. The lower court erred in denying appellants' motion to suppress the evidence contained

in Exhibits D, E, F, G, H, I, J and K, and erred in admitting the same into evidence.

The objections to the admission of the said exhibits were made as each was presented. See (TR 155-159), and motions to suppress their use as evidence were made as early as it was possible for counsel to make them. Motions to suppress the evidence were made even prior to the time that counsel learned that the Exhibits involved were claimed by any of then defendants.

Point 6 is considered here as to the lack of evidence as to the weight and classification of the package containing the heroin sent through the mail.

We submit that the evidence of Mrs. Boyle, the Postmaster at (TR 76) was no more than conjecture or a conclusion of the witness.

On Point 7 appellants base their most substantial claim for a reversal.

Point 7 alleges the opening of any sealed packages in the mail, without a warrant, as being unconstitutional.

We state this despite Part 135.7 of the Postal Regulations which provides:

“Fourth class mail must be wrapped or packaged so that it can be easily examined. Mailing of sealed parcels at fourth-class rate of postage is deemed to be the consent of the sender to postal inspection of its contents. To assure that their parcels will not be opened for postal inspection, patrons should, in addition to paying the first-class rate of postage, plainly mark their parcels first class or with similar endorsements.”

While in the case at bar it appears that airmail postage was paid, how many people know what the postal regulations are—and even knowing, is one to be bound by a mere regulation where a constitutional right of search and seizure of a person's private property is concerned.

Certainly this regulation (Part 135.7, *supra*) gives no right for the post office officials to seize the package at the U. S. Marshal's request and then call in the Marshals for the search. Appellants urge that Sections 243 and 700, U.S.C.A. 39 are unconstitutional as a violation of private rights, and if not, it is made unconstitutional by the bringing in of U. S. Marshals to inspect mail so opened.

39 U.S.C.A. 475 in defining *Air Parcel Post* does not designate this as being fourth class mail.

Ex Parte Jackson, 96 U.S. 727

was good law when it was made and is good law today. Parcel post facilities and air mail were unheard of in 1872 as we know them today. It is Appellants' contention that had the court at the time of *Ex Parte Jackson* been considering a package, rather than a letter, the result would have been the same to protect the right against unlawful search and seizure.

Of the few cases bearing upon our action, of greatest import is another involving the sending of heroin by air mail; and its search and seizure:

Oliver v. United States, 239 F. 2d 818,

and we quote from the syllabus as follows:

"1. *Searches and Seizures*. Protection against unreasonable search and seizure of one's papers

or other effects, guaranteed by the Fourth Amendment, extends in fitting manner to their presence in the mails. U.S.C.A. Const. Amend. 4."

"2. *Post Office.* Congressional measures or Post Office Department regulations covering inspections of mail can only be enforced consistently with rights reserved to people against unreasonable search and seizure. U.S.C.A. Const. Amend. 4."

"3. *Searches and Seizures.* If the field involved in a particular situation has been made the subject of greater legislative or administrative restrictions respecting scope or manner of exercising search and seizure privilege as to the field, question or reasonableness of search on general constitutional grounds may not be reached as the legislative measures and administrative regulations may themselves be determinative of the official impropriety or legal unfairness of the acts done. U.S.C.A. Const. Amend. 4."

"4. *Post Office.* Where inspection of Congressional Acts and administrative regulations respecting inspection of mails revealed that all mail on which first class postage has been paid was not subject to inspection, such statutes and regulations themselves were determinative of official impropriety or legal unfairness of inspecting first-class air mail packages without consideration of fundamental unfairness or unreasonableness on general constitutional grounds. U.S.C.A. Const. Amend. 4; 39 U.S.C.A. Sec. 250, 251; Air Mail Act, Sec. 2, 39 U.S.C.A. Sec. 462; 5 U.S.C.A. Sec. 22."

"5. *Criminal Law. Post Office.* Where wife mailed to her husband a first-class air mail pack-

age, the opening and inspecting of same by postal authorities, without a warrant, constituted an unreasonable search and seizure and conviction of wife based on evidence obtained thereby was reversed. 18 U.S.C.A. Sec. 1716; Narcotic Drugs Import and Exports Act, Sec. 2, 21 U.S.C.A. Sec. 174; 26 U.S.C.A. (I.R.C. 1954) Sec. 4704(a); Air Mail Act, Sec. 2, 39 U.S.C.A. Sec. 462; U.S.C.A. Const. Amend. 4."

"6. *Post Office*. Where matter seized by postal authorities inspecting a first-class air mail package was contraband, person mailing same had no right to have it returned even though authorities discovered its existence as result of unreasonable search and seizure. U.S.C.A. Const. Amend. 4."

In the instant case we contend that the defendant Ruby Field paid air mail postage on the package, it was sufficiently sealed, it contained no notation on the package authorizing postal authorities to open the same, or to call in the Marshals as was done in this instance.

As to the timeliness of application for the motion to suppress evidence, Rule 41(E) F.R.C.P. provides that "the Court in its discretion may entertain the motion at the trial or hearing."

Ganci v. U. S., 287 F. 60:

"2. A Motion to exclude evidence as having been procured through an unlawful and unconstitutional search and seizure, and which affects substantial rights, may be made, and must be ascertained, at any time prior to verdict."

and on page 67 citing *Gouled v. U. S.*, 255 U.S. 298, at top of page is stated:

“A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.”

It is urged that a substantial question of constitutional right is involved in this action; that defendants' counsel moved to suppress the evidence within an hour after the defendant Ruby Fields disclosed to counsel that the package was hers and that there appear to be no Court decisions directly in point if the package is considered as fourth class mail as an air mail parcel.

CONCLUSION.

The manner in which the package was seized and searched and the unconstitutionality of the regulations and laws form the principal basis for appeal. However, counsel reserves the right to fully argue the whole case, as stated in Points on Appeal, when the matter is presented to the court.

We urge that there is a new question involved—does the Post Office Department have a right to open *any sealed package* where no consent is given, and if so does this allow the United States Marshal to use the Post Office as a pawn to make searches and seizures for them, where there is a way as provided in *Ex Parte Jackson*, supra, to secure and search said mail on its receipt by the addressee?

Certainly at the time of *Ex Parte Jackson* the court never envisioned the present day use of the mails.

And the question presented here was never considered in *Oliver v. U. S.*, supra.

We respectfully urge this Honorable Court to fully consider the matter at bar.

Dated, Fairbanks, Alaska,
November 25, 1957.

Respectfully submitted,
EVERETT W. HEPP AND R. J. MCNEALY,
By R. J. MCNEALY,
Of Counsel for Appellants.

No. 15671

United States Court of Appeals
For the Ninth Circuit

DANIEL A. BRETT,

Appellant,

vs.

MOORE-McCORMACK LINES, INC.,

Appellee.

BRIEF FOR APPELLANT.

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AUG 17 1957

PAUL P. O'BRIEN, CLERK

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No. 15671

**United States Court of Appeals
For the Ninth Circuit**

DANIEL A. BRETT,

Appellant,

vs.

MOORE-McCORMACK LINES, INC.,

Appellee.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

This is an appeal from a final judgment of the United States District Court for the Northern District of California, Southern Division. Notice of Appeal to this Honorable Court was timely filed. The case is a seaman's action for damages and wages on account of personal injuries under the Jones Act (Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec. 688) and the general maritime law, the District Court having jurisdiction under both provisions of law. This Court has jurisdiction of this appeal pursuant to the Act of June 25, 1948 (c. 646, 62 Stat. 929, 28 U.S.C. Sec. 1291).

II.

QUESTIONS INVOLVED.

1. Whether the Court erred in making unfair and prejudicial comment to the jury?

2. Whether the Court erred in giving his instructions and in refusing to give the plaintiff's proposed instructions?

3. Whether the award of damages was so inadequate and inconsistent with the evidence that a miscarriage of justice was done?

III.

STATEMENT OF THE CASE.

The appellant, Daniel A. Brett, is an American merchant seaman of Filipino-Irish descent. He was injured aboard appellee Moore-McCormack Lines, Inc.'s passenger-freighter, the *MORMACGULF* at Port of Spain, Trinidad, on February 20, 1955. The vessel at the time was lying offshore, at anchor, having just sent its passengers ashore.

When a ship is anchored in the stream, as the *MORMACGULF* was, it is a rule of the sea that an appropriate signal must be displayed so as to warn other ships that it is at anchor. By these requirements, the signal varies according to whether it is daytime or nighttime. At night a white light is required and during the day, a black ball is required.

Appellant was on "watch" during the time when the white light was to be replaced by the black ball, i.e. at break of day. One of his duties while "on watch" was to see to it that this change was made. At night, the black ball is kept in the forepeak or forward part of the ship. During the appellant's watch the passengers were sent ashore. In addition to his regular duties he was ordered to assist the passengers. This caused a delay in the changing of the anchor signals. When appellant was finally able to attend to this, daybreak had already passed. By that time changing the signals became a matter of urgency. Appellant went into the forepeak to get the black ball. As he came out and was closing the door to the compartment, an exhaust ventilator cover, weighing approximately thirty-six pounds and attached to the wall at the exhaust outlet, came down on the head of the appellant causing him to suffer severe head and brain injuries.

Appellant was removed to shore at Port of Spain for treatment and was taken back aboard ship. The ship continued its voyage to its next port, Rio de Janeiro, Brazil. On this entire trip, appellant was totally bed-ridden suffering from constant headaches and projectile vomiting.

When the ship arrived at Rio de Janeiro, appellant was removed to Strangers Hospital for treatment. He stayed there for two weeks and his ship sailed without him upon notification that he could not rejoin the ship. Thereafter he was flown back to San Francisco, California, to the U. S. Public Health Service Hospital.

Appellant's injury was caused by the fact that the above mentioned ventilator exhaust cover was not properly secured and as a result swung upon its hinges from an up to a down position.

Appellant was off work for a period of more than two years at the time of the trial. He suffers from a permanent brain injury which has given rise to a petit mal form of epilepsy. He continues to have projectile vomiting, dizzy spells and constant headaches. As a result of medical findings his master's license and the other papers authorizing him to pursue his career at sea have been revoked by the U. S. Coast Guard. He claimed damages for loss of wages, both past and prospective, permanent disability, and pain and suffering, both physical and mental.

IV.

SUMMARY OF ARGUMENT.

1. The Court below committed error by conducting the entire proceedings in a prejudicial manner and in making grossly prejudicial comments to the jury during the course of his charging them. This aroused a passion and prejudice in the jury and very greatly affected their verdict.

2. Appellant contends that the trial Court erred in giving certain instructions, over appellant's objections, on "negligence and unseaworthiness" in an inadequate, ambiguous and erroneous manner; in giving instructions on "contributory and comparative negli-

gence” when there was absolutely no evidence to support such a finding; in giving instructions on “damages” which were inadequate, ambiguous and erroneous; and in failing to give appellant’s instructions on these matters which were proper statements of the law.

3. The evidence required an adequate award for the appellant. It was unquestionably established that the ventilator exhaust cover was “improperly secured” and as a result fell and caused appellant’s injury. This was negligence under the Jones Act and “unseaworthiness” under the general maritime law, the latter cause of action resulting in absolute liability upon the ship owner. The verdict was so grossly inadequate as to justify the award of a new trial.

V.

ARGUMENT.

1. THE COURT BELOW ERRED IN MAKING CERTAIN COMMENTS TO THE JURY WHICH WERE UNFAIR AND PREJUDICIAL AND WHICH MATERIALLY AFFECTED THE JURY’S VERDICT.

In his instructions to the jury the Court below charged as follows:

“Now, the attorneys have written on the board \$500,000.00 and \$300,000.00. I wish to say to you that in the opinion of the court any such figures as that are *fantastically high and have no relationship to the evidence in this case*. Any verdict—I am not saying that you should not make a substantial award based—if you come to the conclusion that the plaintiff is entitled to recover—

but that must be based upon the evidence that you have in the case, and *any such sum as \$500,000.00 or \$300,000.00, in my opinion, is so far beyond the reach of the evidence in this case as to reach the field of the fantastic.*" (Reporter's Transcript, p. 829.) (Emphasis added.)

"Now, likewise, damages should not be awarded by way of punishment. You are not here to punish anyone; *nor are you here in any crusade to divide the wealth of the country.*" (R., p. 830.) (Emphasis added.)

These statements were objected to by appellant on pp. 844-847, Reporter's Transcript. That they were utterly unjustified by any evidentiary conception, see *infra*, pp. 8-10.

The import of these statements was that the figures asked for in the complaint were unreasonable figures and that the jury should not consider or return anything in the nature of \$500,000.00 or \$300,000.00.

This was clearly prejudicial and unfair to appellant's case. The effect was to arouse the jury. That such conduct violates the basic right of a litigant to a fair and impartial trial has long been recognized. In *Quercia v. United States*, 289 U.S. 466, at p. 470, Chief Justice Hughes' opinion reads as follows:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial . . . His privilege of comment in order to give appropriate assistance to the jury is *too important* to be left without safeguards against abuses. *The influence of the trial judge on a jury 'is neces-*

sarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression upon the evidence 'should be so given as not to mislead, *and especially that it should not be one sided*';'' (Emphasis added.)

See also: *Knapp v. Kinsey*, (CCA 6), 232 Fed. 2d 458 at p. 466. Petition for Writ of Certiorari denied 1 L.Ed. 2d 86; *Crowe v. Di Manno*, (CCA 1), 225 Fed. 2d 652, at p. 655; *Connelly v. U.S. District Ct.*, (CCA 9), 191 Fed. 2d 692 at p. 697; *Billeci v. U. S.*, (CCA DC), 184 Fed. 2d 394 at p. 403.

Furthermore, the Court stated in his instructions that the issue of liability of the defendant in this case is not an easy one for the jury to determine (R., p. 826). Hence, when the Court thus inferred lack of evidence together with the above discussed prejudicial statements, the jury was undoubtedly impressed with the notion that any award of damages should be kept down to a minimum.

Such an overstepping the bounds of his privilege to comment is not cured by a statement to the jury that the Court's opinion is advisory only and is not binding on the jury. That admonition is always necessary. At most, it can offset only brief and minor departures from strict judicial impartiality. *Quercia v. United States*, supra.

It is recognized that in a trial by jury in a Federal Court, the judge is not a mere moderator but is the

governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, it is within his province to assist the jury at arriving at a just conclusion by explaining and commenting on the evidence. Appellant submits that in making these statements in the case at bar the Court in no wise related them to any of the facts in evidence other than making the general statement that the damages were not supported by the evidence. Instead of *assisting* the jury in *eliciting the truth* and *examining the facts*, the Court rendered a profoundly damaging opinion properly within the scope of advocacy and argument rather than judicial comment.

The judge may array the evidence and comment on it to the jury, but comments should be judicial comment *fairly explaining* to the jury the contentions of the parties with respect to the evidence, and not argument by the Court in support of those contentions. *Virginian Railway Company v. Armentrout*, (CCA 4), 166 Fed. 2d 400, 4 A.L.R. 2d 1064. Nor may the Court refer to a sum suggestive of a proper award of damages or place a limit on the verdict of the jury. *Dowel, Incorporated v. Jowers*, (CCA 5), 166 Fed. 2d 214. Writ of Certiorari denied 68 Sup. Ct. 1346; *Wood v. Morrow*, (CCA 5), 119 Fed. 2d 776. The damages claimed were not "fantastic" but were clearly supported by the evidence.

At the time of the injury the appellant was earning approximately \$10,000 per year. He worked steadily and took very little time off. The accident occurred two years prior to the trial; he therefore had a wage

loss of at least \$20,000. Appellant's position with the company was secure. He held a master's license and in not too long a period of time, he would have been master of a vessel. According to the testimony of the defendant's own witness, Capt. Sommers, such a position receives pay of \$11,000 per year. The 1937 Standard Annuity Table shows that at this time the appellant has a life expectancy of 33 years. Under the evidence of the case the jury could have found, as reasonable men, that the plaintiff was permanently disabled. The work loss for the remaining period of his life would then amount to in excess of \$330,000.00.

If we take only his life expectancy till age 65, the age until which time he would normally be expected to be employed, he would still have a wage loss, if permanently disabled, of \$250,000. Coupled with his previous loss, he would have a total loss of \$270,000 in wages alone.

This does not allow any award for pain and suffering, humiliation, embarrassment. These items would undoubtedly be considerable when a man is an epileptic and has these fits in public places. In addition this does not allow any award for the psychiatric care that will be necessary for the man, for the medicines which he must take until he dies, or any of the other intangible things which the jury could well weigh in awarding damages. If the jury did find that he was permanently disabled, they could well have found a verdict between the sums that were placed on the board—\$300,000 and \$500,000.

Assuming on the other hand that appellant will be capable of going back and working, he will still have his wage loss of \$20,000 and will have a prospective loss. He cannot immediately jump into something else where he would be earning \$10,000 to \$11,000 a year. There will certainly have to be a period of rehabilitation when he will be earning considerably less. In all likelihood his future will consist of a job at about \$100 per week, and, even if he does have a job at \$100 a week, he will have a prospective wage loss of \$5,000 per year for the 25 years, or a total of \$125,000 attributable to loss of wages. This amount plus the \$20,000 he has already lost would amount to \$145,000. The general damages, again, for his pain and suffering, humiliation, psychiatric treatment, medicines, and all of the other things that will be necessary for this man, could reasonably have been found by the jury to be valued at between \$150,000 and \$250,000.

This should have been a case of admitted liability. The defendant offered \$75,000 in settlement. Such a figure clearly manifests the belief on the part of the defendant that liability exists. It cannot reasonably be argued that such sum was offered in settlement in order to avoid the time and costs involved in litigation—it is inconceivable that the “time and cost” involved in litigation could be so highly valued.

If speculation as to whether the erroneous charge was in fact harmful might be properly entered upon, it would be difficult, if not impossible, to resist the

conclusion that the charge of the Court, that the damages claimed were “fantastically high” had the inevitable effect of producing a small verdict. But, when error of the magnitude of this one is in question, speculations of this kind are utterly irrelevant.

In *Connelly v. U. S. District Court*, (CCA 9), 191 Fed. 2d 692, at p. 697, this Court said:

“It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial, but that there also shall be such an atmosphere about the proceeding that the public will have the ‘assurance’ of fairness and impartiality.”

It is submitted that the entire proceeding lacked such an “atmosphere” of fairness and impartiality and that partiality and prejudice was manifested from the manner and nature of the judge’s conduct of the trial as follows:

At page 118, Reporter’s Transcript, in the course of the direct examination, of the plaintiff the Court refused to allow counsel to develop the fact that the plaintiff was suffering from hallucinations, a necessary element for the jury to consider in determination of the question of general damages.

At pages 208-209. During cross-examination of Dr. Victor J. Freeman, a Diplomat in psychiatry and head of the psychiatric unit of the U. S. Public Health Service Hospital in San Francisco, an independent doctor whom appellant called as a witness, the Court intervened and became argumentative with the wit-

ness, even after the witness had answered the Court's question.

At page 234. During cross-examination of plaintiff the Court interrogated witness in an apparent attempt to show that the witness acted unreasonably. The Court assumed a fact not in evidence by suggesting that plaintiff should have gotten something to stand on so as to open the vent cover (line 8) and became argumentative with the witness (line 11).

At page 274. During cross-examination of appellant's witness, Dr. Charles L. Yeager, an independent witness, whom appellant called, the Court interjected a suggestive question, the answer to which was clearly prejudicial in that it tended to minimize the gravity of plaintiff's injuries.

At page 293. During cross-examination of plaintiff's witness, Dr. Lester S. Margolis, also an independent witness, the Court again interjected two questions which suggested answers clearly prejudicial to the issue of damages of the plaintiff.

At pages 296-297. During cross-examination of Dr. Margolis, plaintiff objected to a line of inquiry on the grounds that no foundation had been laid by counsel to the effect that plaintiff's present injury was related to an old injury. The issue would tend to reduce the question of plaintiff's injury and damages as a result of the accident. Inasmuch as the question was not pleaded by the parties, this line of inquiry constituted surprise to the plaintiff and had a prejudicial effect upon the jury. Furthermore, this objectionable line of inquiry was again pursued by the defendant's counsel

at pp. 348-351 and pp. 370-372. Notwithstanding the effect of the questions and plaintiff's objections thereto, the Court failed to rule upon the objections.

Page 348, line 1. The Court stated, "I don't think you will get an answer from him anyhow," inferring that plaintiff's witness on cross-examination was being evasive and prejudicial. The record shows that there was no basis for such an opinion, and to have made it before the jury as it was, was to discredit an important expert witness on plaintiff's behalf.

Page 440. At the close of plaintiff's case, (in the absence of the jury) the Court told the counsel for both sides that he questions whether there is sufficient evidence of liability in the case. Yet, the facts show:

1. Uncontradicted evidence that the vent cover was improperly secured. This resulted from the negligence of someone for whom the shipping company was responsible, and rendered the ship unseaworthy as to this plaintiff. There was absolute liability upon the defendant.

2. That the plaintiff acted reasonably at all times with respect to any danger to himself and that he did not, in fact know, nor have reason to know that a condition, dangerous to himself, even existed, and was therefore free from contributory negligence.

3. As a direct and proximate result of the condition of the ship plaintiff was injured.

In the absence of prejudice against appellant's cause it is submitted that there was no basis for the observation by the Court that there is a question as to liability.

Pages 468-471. During direct examination of defendant's witness, various questions calling for speculation were asked by defendant's counsel. Upon various objections and motions to strike these answers, all the objections were overruled and the motions to strike denied.

At page 574, Reporter's Transcript. During direct examination of defendant's witness, Dr. Edmund J. Morrissey, counsel asked a leading question. This was promptly objected to by counsel for the plaintiff. However, not only was the objection overruled, but the Court himself prompted the witness to answer even before ruling on the objection. The question was clearly leading and therefore objectionable.

Page 575. The answer to the above leading question wasn't even responsive. Counsel for plaintiff moved that it be stricken on those grounds. Again, the Court ruled in favor of the defendant.

Page 630. Again (in the absence of the jury) the Court showed, despite the evidence of liability offered by the plaintiff, prejudice:

"The Court. Just because this nice young man had a serious injury here is not an occasion for just coming into court with a wave of the hand and saying: this is what I want.

Mr. Belli. We have never treated it that way.
The Court. You have some problems."

Pages 660-661. The Court ruled that an admission against interest is admissible but not admissible as to proof of the fact therein asserted. This is an incorrect statement of the law. (*Infra*, pp. 33-34.)

Pages 662-663. During discussion of motion for directed verdict the Court engaged in speculation as to whether a statement, offered by plaintiff as proof of the matter asserted, is hearsay when the evidence, of itself, showed no basis for such an inference.

Page 668. The Court displayed prejudice (in the absence of the jury) on lines 9 and 10 by inferring that a recovery in this type of case depended more upon the attorney the plaintiff happened to choose than upon the merits of the case itself.

The Court below participated very actively in the trial from beginning to end. Throughout the transcript of the proceeding there were many questions of witnesses, comments on the evidence, and remarks by the Court. In view of the one-sidedness, these various interjections clearly show that the unfair conduct and lack of impartial atmosphere throughout the proceeding so seriously prejudiced the plaintiff in presenting his case to the jury that he was deprived of his right to a fair and impartial trial.

2. THE COURT BELOW ERRED IN GIVING CERTAIN INSTRUCTIONS AND IN REFUSING OTHER INSTRUCTIONS REQUESTED BY APPELLANT.

A. The Court's instructions on the matter of "damages" were grossly inadequate, erroneous and prejudicial and materially affected the jury's verdict.

Over the objections asserted by the plaintiff (R., pages 842 to 844), the Court instructed the jury on the subject of "damages" as follows:

“And in general, you may take into account in determining—if you reach the point where you feel the plaintiff should recover—you may take into account the nature of the man’s, the person’s injury, the extent of the injury, whether it is a permanent or a temporary injury, any pain or suffering the man may have had, any pain he might be likely to undergo in the future; you may consider any loss of earning capacity in the past or any loss of earning capacity that would be, according to the evidence, likely to occur in the future; and from all of those factors, you will determine what sum will compensate for the injuries sustained.”

“Now, damages must be reasonable. You are limited to what the evidence shows to be damage in making any award that you would choose to make in this case. You may take into account the period of life expectancy that the plaintiff might have in determining the amount of his disability; you may determine in connection with the extent of his disability his capacity to work, how much and to what extent he is disabled from performing any reasonable activities that he might reasonably be able to engage in.” (R., pages 828-829.)

These general instructions covered very briefly and inadequately only the subject of compensatory damages for injuries the appellant sustained and damages resulting from loss of earning capacity. The Court failed to instruct the jury on the matters of special and general damages and the distinctions thereof and the important elements of damages upon which the appellant’s case rested.

One of the major elements of damages which the plaintiff was shown to have sustained as a result of the injury was mental pain and suffering. By the uncontradicted testimony of an expert witness, Dr. Victor J. Freeman, a psychiatrist, we find that the injury and its consequences had an extremely adverse effect upon the plaintiff's emotional well being. This evidence was brought out both during the direct examination and the cross-examination of the witness.

The direct examination:

"Q. Could you tell the ladies and gentlemen what is the real damage to him, if anything, psychiatrically speaking, that will be permanent?"

"A. Well, as I said, in Mr. Brett's case, he has a type of personality where he is, if anything, over-conscientious, and this kind of personality in psychiatry we find to be the one most susceptible to a depressive reaction if there is any major loss in their life . . . In this case, there is no question in my own mind that Mr. Brett is reacting to this loss of his occupation, *which is more to him than mere earning power in just such a way.*" (R., page 194.) (Emphasis supplied.)

The cross-examination:

"Court. What I think you are really trying to find out, if I may ask it in just plain language, is that if the so-called convulsive seizures that the plaintiff has get better, you are not going to worry about the psychiatric aspect, are you?"

"Witness. With the one stipulation, if he is able to get back to sea; if he was still not able

to get back to sea, regardless of the neurological disorder, he would still be disabled psychiatrically.” (R., page 208.)

The fact is that the plaintiff, the defendant and even the Court brought out the fact of mental suffering, humiliation and worry. In addition, plaintiff’s wife testified that he wasn’t “the same man” and that he suffered emotionally as he in fact did. The record shows that the plaintiff has suffered and is likely to suffer in the future from humiliation and embarrassment by reason of becoming an object of curiosity and ridicule among his fellows. This is clearly manifested from the evidence and particularly in the manner of person which the plaintiff is. In *Risley v. Lenwell*, 129 Cal. App. 2d 608 at page 652, the Court held, as proper, instructions to the effect that,

“ . . . physical pain and mental suffering were proper elements for the jury to consider; that the term ‘medical suffering’ included anxiety, worry, mortification, embarrassment and humiliation; and that mental suffering occasioned by any future pain was also a proper element of damage.”

It is submitted that for the Court to have completely omitted any mention of mental pain and suffering and to have given so general an instruction as was given, was prejudicial error. As against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of a case, if there is evidence to support it and a proper request is made, *Montgomery v. Virginia State Lines* (CCA DC), 191

Fed. 2d 770. One of the essential elements of plaintiff's claim for damages, viz., mental pain and suffering, was not included within the charge. Plaintiff's Proposed Instruction No. 19 correctly covered this matter and should, therefore, have been given.

As a result of the failure to have given this requested instruction, combined with the giving of the one actually given, the jury did not take this element into consideration in their determination of the amount of damages. This, in turn, produced an inadequate award.

The Court failed to charge the jury that it may take into consideration any and all future hospital, doctors' and general medical expenses that plaintiff may incur both presently and in the future. Again, these were essential elements upon which the appellant sought his recovery.

There was evidence in the record which clearly supported the appellant's contention that his injury is of a permanent nature. He requires continuous medication in order to avoid the attacks and seizures. Medical testimony to the effect that no improvement is foreseen indicated that the man will require such medication for the rest of his life. In addition, there are the tests which will be needed in order to determine whether the plaintiff may require additional medical attention, and the incidental expenses for doctors, hospitals, technicians, etc.

The general charge neither encompassed these elements of recoverable damages nor even indicated them.

Again, the jury was at a loss in determining the amount of damages aside from "injuries" and "loss of earning capacity".

With reference to the Court's charge on loss of earning capacity, it is the general rule that in a personal injury action the Court should instruct the jury to take into consideration, in estimating the plaintiff's damages, his future inability to attend to his *usual business or to perform the kind of labor to which he was fitted*. (15 Am. Jur., Damages, Section 380, page 819.) Plaintiff requested that the correct instructions be given on this matter and himself proposed Instruction No. 19 which was correct and properly urged plaintiff's contention which was supported by evidence in the record. The Court refused to give these instructions and over the plaintiff's objection (R., page 842) instead charged the jury as follows:

"... You may determine in connection with the extent of his disability his capacity to work, how much and to what extent he is disabled from performing any reasonable activity that he might reasonably be able to engage in." (R., page 829.)

This instruction was confusing and tended to mislead and confuse the jury. What was meant by "reasonable activity" in the context as used? Did the Court purport to mean that "reasonable activity" encompassed employment as a seaman? In such a case, plaintiff would be completely and absolutely disabled from employment and his damages from loss of earning capacity would be computed upon employment as a seaman. On the other hand, perhaps the Court meant

by "reasonable activity" to exclude all forms of employment whereby plaintiff could not work because of his disability. The inference in such case was that the plaintiff was not affected by the disability. From this it follows that the jury would erroneously conclude that as to certain jobs, the plaintiff had suffered no disability and therefore had sustained no loss of earning capacity since he is still able to work at something. This would be erroneous for it would deny to the plaintiff the recovery of damages for the loss of his lifetime career, and the difference in remuneration between what he would have received therefrom and that which he *might speculatively* receive from some job for which he has never been trained.

This instruction failed to point out that the detriment to be compensated for is the loss actually sustained by the plaintiff himself, and not that which would result to the average man from a similar injury. As a direct result, the jury did not consider the distinction between a man employed as a seaman becoming disabled and the average man employed in an "average" job becoming disabled. This was directly attributable to the Court's erroneous instructions and contributed to the inadequacy of the award.

The Court's charges on the matter of loss of earning capacity were further confused by the inadequate reference to life expectancy tables without a statement as to what was the life expectancy of such a man as the plaintiff. At pages 842 to 843, plaintiff objected to the Court's failure to charge that the life expect-

ancy of a man of Mr. Brett's age was 33 years. In his reply, the Court assigned as the reason therefor that there was "no evidence of that." The Court was erroneous in this. The correct rule is as stated in *Forerster v. Dereito*, 75 Cal. App. 2d 323, at page 333, that, "Without actual proof thereof courts take judicial notice of mortality tables." See also *Risley v. Lenwell*, supra, at page 651; 31 C.J.S., Evidence, Section 99, pages 698 to 699.

The Plaintiff's Proposed Instruction No. 22 properly covered this matter. The plaintiff requested that it be given and objected when it was not. This failure to indicate the plaintiff's life expectancy as an element of damages, other than the broad and general statements made by the Court, left the jury without an important guide in their determination of an adequate award. It was therefore an error which materially affected their verdict.

- B. Court below erred in charging the jury on the matter of contributory negligence; refusing to give plaintiff's proposed instructions that there was no evidence to support a finding of contributory negligence; failing to charge that the defendant had the burden of proof to prove by a preponderance of evidence any special defenses he had alleged.**

The instructions on this matter were as follows:

"If from the evidence you are satisfied that the act and conduct of the plaintiff at the time and place that was described as the time and place of the accident in this case was the sole cause of his own injury then he is not entitled to recover."
(R., pp. 825-826.)

“Now, if you decide that the plaintiff himself was wholly at fault in the matter, then you don’t have to proceed any further in the case, you have decided it. You would then give a verdict for the defendant.” (R., p. 827.)

“... if you should also find that the plaintiff himself was negligent also along—and that his negligence along with either negligence on the part of the ship or unseaworthiness of the ship brought about his injury, in that event, after you have ascertained and determined the total amount of the plaintiff’s damage, if you decide that he is entitled to damages, then you will apportion the damages in the proportion that the negligence, if any, of the plaintiff himself bears to the total negligence.

“That is what is known as the doctrine of comparative negligence in the Federal law. You may take that into account in the manner in which you work out damages, if you find that there was any negligence on the part of the plaintiff himself which concurred with the negligence or unseaworthiness on the part of the ship and proximately contributed to his injury.” (R., pp. 851-852.)

Appellant’s exceptions to these instructions are noted at R., pp. 835-836, 853-854, 863.

While comparative negligence is applicable as against the cause of action founded in negligence, it has no application to an action founded on the doctrine of unseaworthiness. The latter doctrine creates ABSOLUTE LIABILITY. Therefore, there were *no*

defenses available whether to bar this cause of action or to mitigate the recovery of damages.

In any event, however, there was absolutely no evidence whatsoever of contributory negligence or comparative negligence, and therefore the Court committed great error by—

- a. charging the jury on the matter of contributory negligence;
- b. giving these instructions repetitiously so as to place undue emphasis upon the charge;
- c. refusing to give plaintiff's requested instructions that the defendant had the burden of proof as to any and all special defenses; and
- d. refusing to give plaintiff's instructions that the defendant had not met such burden of proof as to any special defense and that therefore the jury should disregard any consideration of the defense of contributory negligence.

The scintilla rule does not apply in the Federal Courts. *DeZon v. American President Lines* (CCA 9), 129 Fed. 2d 404, certiorari denied 63 S. Ct. 160, affirmed 63 S. Ct. 814, rehearing denied 63 S. Ct. 1025. A litigant who alleges an affirmative defense has the burden of proving such defense by a preponderance of the evidence. The "evidence" must be substantial and not a mere "scintilla." In the case at bar the defendant not only failed to sustain his burden of proof as measured by the "substantial evidence rule," but even failed as determined by the "scintilla rule"—i.e., not even a flickering spark of evidence.

Authorities define “contributory negligence” as being “conduct on the part of the plaintiff, contributing as a legal cause to his damage, which falls below the standard to which he is required to conform *for his own protection*. In general, it resembles negligence and is determined by much the same tests as the negligence of the defendant, *except that the element of duty to another does not enter*.” Torts, Prosser, Hornbook Series, Sec. 51, p. 283; Restatement of Torts, Sec. 463.

This is the important distinction between negligence and contributory negligence—in the latter the plaintiff must have reacted unreasonably with respect to a risk of harm *to himself*.

When the plaintiff went into the forepeak, and saw the vent cover closed, he had no more reason to believe or suspect its dangerous condition, that of being improperly secured, than he would have had reason to believe the ship’s smokestack was improperly secured and would fall upon him. There was no foreseeable danger and therefore the plaintiff did not react unreasonably with respect to a risk of harm to himself.

The defendant alleged contributory negligence, and yet the evidence established only the following:

1. The cover is normally open.
2. On this occasion it was closed.

Plaintiff was entitled to the presumption that others had acted reasonably in closing and securing the cover and that therefore it was properly secured and offered no dangerous condition as to himself.

3. When closed, only two dangers could possibly have been risked:

a. the motor might have become defective if sufficient pressure was built up;

b. there might have been improper ventilation to the cargo.

However, at the time in question, the hatch to the cargo hold, being serviced by the ventilation system, was open, and therefore the fact that the system was running had absolutely no effect whatever upon the cargo.

4. By the testimony of several of the defendant's own witnesses (R., pp. 474-476, 503-504), if the vent cover was properly secured there was no danger that the pressure of the motors could force the vent cover off.

5. As a result of his assisting in the dispatching of passengers to the launch to be taken ashore and the performance of his other various duties, plaintiff was not able to change the anchor signals at daybreak. This caused the ship to be in a perilous situation, not only with respect to itself, but also to any other ships navigating the stream where the MORMAC-GULF was at anchor. Changing the anchor signal at that time became not merely a matter of primary importance, but rather a matter of emergency.

The defendant contends that the plaintiff should first have either opened the cover to the ventilator exhaust or have turned off the ventilation system altogether. In order for the plaintiff to have opened

the ventilator cover he would have had to have gone to the midship section and have gotten something to stand on so as to have enabled him to reach the securing mechanisms at the top of the cover. In order for the plaintiff to have turned the ventilation system off altogether, he would have had to have gone to the bridge where the control switch for the system was located. *There was no control switch at the forepeak part of the ship which would have turned the motors off.* Had the plaintiff pursued either of these courses which the defendant now suggests, there would have been an undue risk of collision with another ship, in which case the ventilation system would have become a matter of small importance.

This was the evidence upon which the defendant sought to prove that the plaintiff acted without due regard for his own safety and well being. However, this very same evidence clearly manifests that such an allegation of contributory negligence was, of itself, nothing more than an attempt to confuse the jury and to induce them to render an ineffective and inadequate award for the plaintiff upon a case which should have been admitted liability. (The defendant having offered to settle before the trial for \$75,000.00.)

The plaintiff did not act unreasonably with regards to protecting himself against undue risk of harm when he sought first to change the anchor signal and thereafter shut off the ventilation system. Quite the contrary, had he first attended to the relatively small matter of the vent cover, rather than changing of the

warning signals, then his election and conduct would have been very unreasonable both as regarding the safety of the ship and its crew as well as himself. Upon these facts reasonable men could draw no different conclusion. In *Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, the Court held:

“If reasonable minds may draw different inferences, or reach different conclusions, a jury question is presented. But, if reasonable minds can reach only one conclusion, the jury should not be allowed to speculate upon the matter. To do so is to allow them the opportunity of returning a wholly unreasonable verdict.”

It is error to give instructions upon allegations in the pleadings which are not supported by proofs at the trial. Furthermore, where there is no evidence tending to prove a particular fact, the Court is bound to so instruct the jury when requested. *Greenleaf v. Birth*, 34 U.S. 292 at p. 299. The appellant requested the Court to instruct the jury to disregard the allegations of contributory negligence (see instruction No. 7), which was a correct and proper charge and therefore should have been given. This was refused. This constituted error of particular materiality in view of the above mentioned erroneous instructions on the matter of contributory negligence.

Further error was committed by the Court in failing, over plaintiff's requests and objections, to charge that the burden of proving special defenses was upon the defendant. Had such a charge been so given, the jury could have determined that there was

no evidence of contributory negligence and would have so found. Without the charge the jury was not restricted to the limitations of "preponderance of evidence", but was free to find contributory negligence even upon the pleadings, alone.

Inasmuch as there were instructions on contributory negligence where there was no evidence thereof, there was undue emphasis placed upon this matter, and there were no instructions as to burden of proof as to the matter of contributory negligence, there was gross error, which, combined with the other errors herein assigned, caused the jury to bring in an extremely inadequate award of damages.

C. The Court's instructions on negligence and the doctrine of "unseaworthiness" were inadequate, ambiguous, and erroneous and clearly affected the jury's verdict.

The instructions given by the Court on this subject were as follows:

"Now, the owner of the ship has a duty to maintain and provide gear and appliances and appurtenances of a safe and suitable character, suitable and safe for the purposes for which those particular pieces of equipment or gear or appurtenances are designed and intended to be used. In order to determine whether the plaintiff has sustained by a preponderance of the evidence his claim that the cover of the air outlet in this case to which reference has been made was seaworthy, you should consider all of the circumstances as time, place, and persons involved. That is, you should consider the purpose of the cover, its location and its condition, as you find it to be the

case from the evidence that has been presented to you at the time of the alleged accident, and if it appears to you by a preponderance of the evidence that the cover was in fact unseaworthy, according to the definition that I have given you, and that that was the proximate cause of the injury, then there would be liability upon the part of the defendant." (R., p. ~~844~~)

824

Appellant objected to this instruction (R., p. 834) and requested the Court to give, in detail, a more full definition of the elements of a cause of action based upon unseaworthiness. Plaintiff's proposed instruction No. 12 covered briefly and correctly the elements of the unseaworthiness cause of action, to wit:

1. The liability of the ship owner to the seamen for the injury resulting from unseaworthiness does not depend upon negligence.

2. The liability is absolute—exercise of due care does not relieve the owner of his duties to furnish adequate appliances.

3. This duty is absolutely non-delegable.

4. The duty is contractual in nature.—*Patterson v. Alaska S.S. Co.* (C.C.A. 9), 205 Fed. 2d 478; *Seas Shipping Co. v. Sieracki*, 328 U.S. 85.

Nowhere did the Court instruct the jury as to the above requested elements. Without an instruction encompassing these important and distinguishing elements, the cause of action founded upon unseaworthiness is not distinguishable from a cause of action founded upon negligence alone. In short, the Court

gave two instructions on negligence and none on the matter of unseaworthiness. The appellant was entitled to have a clear and distinct instruction on this latter cause of action. In the absence thereof he was unjustly required to bear a greater burden of proof and, in substance, had to show negligence or else fail to recover.

The Court further instructed as follows:

“Now, if you decide that the plaintiff himself was clearly at fault in the matter, then you don’t have to proceed any further in the case, you have decided it. You would then give a verdict for the defendant.”

“If you decide that the plaintiff has not shown by a preponderance of the evidence that the defendant was negligent and that that negligence was not the proximate cause of his injury, then also your work is finished and you don’t have to go any further, you decide in favor of the defendant.” (R., p. 827.)

Along these same lines this instruction further confused the jury as to any distinction between negligence and unseaworthiness and was in fact an erroneous statement. It is settled law that liability for unseaworthiness arises completely irrespective of any showing of negligence on the defendant’s part—*Seas Shipping Company v. Sieracki, supra*; *Patterson v. Alaska S.S. Co., supra*. That such error materially affected the jury is obvious in view of the fact that the import of these instructions was that unless plaintiff prove negligence he cannot at any rate recover.

Not only did the Court place a greater burden of proof upon the appellant, but erroneously withdrew material evidence with which the appellant could have met such burden.

The instructions given by the Court on this subject were as follows:

“We have a Federal statute, that the attorneys have referred to as the Jones Act, and that’s the act by which seamen may sue the owner of a ship and can recover damages for any injury that he sustains if he can show that his injuries were due to some negligence on the part of the ship, *which means any fellow employee as well*, that either in providing him a safe place to work or in negligently not providing him with the proper tools and equipment or faulty tools and equipment. He has the burden of showing under the Jones Act, if he seeks a recovery under that act, he has the burden of showing that some negligence on the part of the ship or *other employees* was the proximate cause of his injury.” (R., pp. 823-824.) (Emphasis added.)

“... one or both of the lawyers, I am not certain which, made some reference to the fact that there are some stevedores involved and that the court would give instructions concerning this matter. I do not intend to give you any instructions on such subjects as stevedores because in my opinion, as far as I can see, *there is no evidence in this case as to who put this cover up*, and therefore, I am not going to give you any instructions on a subject on which there is no evidence before you.” (R., pp. 827-828.) (Emphasis added.)

“Now, ladies and gentlemen, the issue as to the liability of the defendant in this case is, I would say to you, is not an easy one for you to determine *because of the nature of the evidence in the case*, and you will have to use your best judgment and your common sense to decide the question. *You cannot engage in speculation or conjecture or surmise as to how the accident happened in this case.*” (R., p. 827.) (Emphasis added.)

Appellant objected to these instructions. (R., pp. 837-842.) Instructions are to tell the jury what issues are in the cases rather than to tell them what issues are not. *Consolidated Electric Coop. v. Panhandle E. Pipeline Co.* (C.C.A. 8), 189 Fed. 2d 777. In addition, appellant contends the Court should have charged the jury as requested by him that, “a vessel owner such as the defendant in this case is liable for the negligent act of a seaman *or longshoreman* causing injury to other seamen aboard the vessel,” and that the Court should have instructed the jury to disregard the statement by the Court that there is “no evidence” as to who put the cover up.

The record shows that by the evidence in defendant’s own Exhibit “A” the following statement was made by one of the defendant’s own representatives in his written report to the underwriters:

“. . . the cover plate had been raised from an open position and *improperly secured* with wing bolts, *apparently by one of the stevedores.*” (Emphasis added.)

Appellant submits that this is not only admissible into evidence as a prior inconsistent statement but also ad-

missible as an admission and as evidence of the truth of the matter asserted (McCormick, Evidence, Hornbook Series, pp. 502-503) and therefore was entitled to an instruction on the law encompassing that fact among the others.

The Court assigned as his reason for charging as he did and for refusing to charge as requested by plaintiff, that this statement seemed to be based upon opinion rather than first hand knowledge. He emphasized that the use of the word "apparently" indicated this. (R., p. 838.) The Court was in error in his action and in the reasoning therefor.

The fact that the admission was opinion or based upon hearsay does not of itself render the admission inadmissible, either as such, or for the purpose of proving the truth of the matter contained therein. It is submitted that when a man speaks against his own interests it is supposed to be that he has made an adequate investigation. (McCormick, p. 507.) In the case at bar, the statement was made in a report of the accident to the underwriters of the defendant ship company. It seems inconceivable that such reports would be made unless and until a most thorough examination and investigation had first been made. Here on the basis of his investigation, the conclusion was that the cover was improperly secured "apparently by one of the stevedores."

Furthermore, the use of the term "apparently" does not of itself render this statement nugatory. According to Webster's New Collegiate Dictionary, "apparently"

is defined as “having such an appearance of reality as to appear reasonably true under the circumstances.” Upon his investigation of the “circumstances” the defendant’s representative stated as being “reasonably true” that the vent cover was improperly secured by one of the stevedores.

In *Kulukundes v. Strand* (C.C.A. 9), 202 Fed. 2d 708, this Court impliedly approved the use of this term in order to reach a similar finding, viz., that the stevedores had been negligent. There we had a case where a longshoreman was injured when he fell into the ship’s hold, allegedly as a result of defects of strongbacks and flanges, which rendered the proper securing of the hatch covers very difficult. While the claimant was carrying on his work, one of the hatch covers, on which he stood, gave way precipitating him into the hold. Some question arose as to who had left the hatch cover so improperly secured. This Court said at pp. 710-711:

“The exact manner in which the hatch cover on which Strand was standing slipped out of place, precipitating him into the hold below, is not entirely clear from the record . . . Strand denied personally having placed the hatch cover on which he was standing, and appellant (vessel owner) introduced no contrary evidence. *The hatch cover was therefore apparently placed by one of the other longshoremen.* This was not such a superseding cause as would bar appellant’s liability.” (Emphasis added.)

In the case at bar, the appellee not only failed to introduce any evidence which would show that the

cover was not put up by stevedores, but himself introduced said "reports of the accident" as his own exhibit. Let him not now be heard to impeach his own evidence.

The fact that the statement was based on an opinion would go only to its credibility (*Pekelis v. Transcontinental and Western Air* (C.C.A. 2), 187 Fed. 2d 123 at p. 129), and, of course, credibility of evidence is properly within the province of the jury, not the Court.

The clear import of these instructions was not only to withdraw from the jury actual material evidence upon which the plaintiff's case was based but also to induce the jury to believe that such evidence was "speculation, conjecture, or surmise." Had the Court given the plaintiff's requested instructions on the matter of defining and explaining "inferences and presumptions," the jury, despite the judge's remarks, would have found evidence to more strongly support the plaintiff's case and, commensurate therewith, would have rendered a more adequate award. It was therefore prejudicial error for the Court to, not only have failed to instruct the jury as requested by the plaintiff, but to have told them that "there was no evidence" on stevedores.

3. **THE AWARD OF DAMAGES WAS GROSSLY INADEQUATE AND WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE.** (Supra pp. 8-10.)

Completely aside from the elements of physical and mental suffering, and from extensive medical care and treatment, and assuming that the jury contemplated only loss of earning capacity when they awarded a \$44,000 verdict, the verdict is nevertheless grossly unjust and utterly irreconcilable with the facts, to wit:

Plaintiff earned about \$10,000 per year. As a result of the injury, he was out of work two years until the time of the trial and was therefore unquestionably entitled to \$20,000 for past loss of earnings. This leaves \$24,000 to account for his future loss of earning capacity.

By the 1937 Standard Annuity Table, the plaintiff has a life expectancy of about thirty-three years. But, even assuming that, we will look only to his so-called productive or useful years, i.e. to the traditional retirement age, sixty-five. The plaintiff, therefore, has twenty-five years in which he would normally be expected to be gainfully employed.

Now then, if we take this figure of \$24,000 to account for his future loss of earning capacity, it means that despite his injury, and despite his being termed an "epileptic," and despite the fact that the man is forty years of age, inexperienced and unfamiliar with any other line of work, the jury nonetheless felt that the income the plaintiff will earn will only be reduced by less than \$1,000 annually, i.e., that by reason of the injury and its full consequences, plaintiff will

suffer only a loss in earning capacity of less than \$1,000 per year. By inference then, the jury felt that the plaintiff will start right out on another job and immediately begin earning in excess of \$9,000 per year. Such an absurdity!

Following this, then, just how much by way of damages is left to compensate the plaintiff for his past, present and future sufferings? Is it the belief of the jury that the physical pain and discomfort involved in projectile vomiting, constant headaches, dizzy spells and the like which the plaintiff suffers are, at best, nominal? Is the label "epileptic" and all the cruel incidents attached thereto, valueless? Surely not! In what way, then, are the plaintiff's suffering, both physical and mental, and his medical expenses to be compensated? Despite the overwhelming evidence, the jury felt there was to be no compensation. This was the direct result of a passion and prejudice instilled in them by the prejudicial comments of the Court. The verdict was so inadequate as to indicate that the jury, in no wise, let the evidence guide them to their award.

VI.

CONCLUSION.

As a result of his injury, the plaintiff can no longer work as a seaman. He made the sea his career. Commensurate with his extremely able and willing work, he received an adequate salary, approximately \$10,000 per year. According to uncontradicted testimony pro-

duced by both sides, the plaintiff's salary was more than well earned. In the light of his past education and experience, it was nothing less than a foregone conclusion that the appellant would one day have become the master of his own ship . . . an ambition he undoubtedly entertained during all his years. With the captainship would, of course, be the increase in pay. Today, such ambitions are allowed to dwell only in the hearts of others. Only the plaintiff's former companions and mates may hopefully and expectedly look forward to this goal. To Daniel Brett there is left only the consolation that some day he, too, *might have been* master . . . a consolation filled only with the bitter knowledge that "someday" will never come.

Of humanity it is said, "A man does not live by bread alone." What, however, shall be said of Daniel Brett? Dr. Lester H. Margolis, Diplomate in neurology and is consultant neurologist at the U.S. Public Health Service Hospital in San Francisco:

"He suffers from a form of post-traumatic epilepsy." (R., p. 282.)

"Once the diagnosis of epilepsy appears substantiated and once anticonvulant or antiepileptic medication is found to be necessary or indicated, *then he is not classifiable as fit for duty at sea.*" (R., p. 289.) (Emphasis added.)

". . . the diagnosis of epilepsy must be made, as has been stated, that I feel the patient does and has to be called an epileptic." (R., p. 290.)

Dr. Victor J. Freeman, a Diplomate in psychiatry and head of the psychiatric unit of the U.S. Public Health Hospital in San Francisco:

“*Indefinitely* unfit for sea duty.” (R., p. 182.)
(Emphasis added.)

Dr. Charles L. Yeager, Diplomate in psychiatry, neurology, and electroencephalography, does not expect the appellant's condition to improve, but to become worse. (R., pp. 262, 277.) These men are experts. They are independent and were called upon by the plaintiff only after they had made their diagnosis. Upon the basis of these reports and their recommendation, the U.S. Coast Guard has revoked appellant's master's license and other papers.

Even the defendant's doctor, Edmund J. Morrissey, felt that the appellant may be subject to convulsive seizures and would not be able to return to work for at least four or five years, *assuming he had no such seizure*. (R., p. 574.)

The appellant's career at sea has come to an abrupt end. There is neither the hope nor the expectancy which an achievement filled future holds. Instead there is the fear and uncertainty which a forty-year old family man must face when thrown upon an unfamiliar and competitively cold employment market in search of a job, a job which is to last for the rest of his useful life.

There will not be the comforting security of a job well done, nor even a job which he knows he can do. There is only the frustrating dilemma of trying to find a job for the mere sake of earning a living, and of being turned down for the fear that he may some day have a convulsive seizure and injure someone.

Trial by jury has evolved through history as the most effective and fair means of securing justice.

Twelve jurors are selected so as to avoid the possible prejudices and passions which any one man might have. It is felt that if any one juror might have such partial leanings, that they would become negatived by the reason and thoughtfulness of his colleagues, the other jurors.

The trial judge, however, sits not with the jury, but above them. To the jury, the trial judge often represents justice personified. Here, they reason, is a man who must be the most well versed person on the law in the entire courtroom. More so than the attorneys. Surely, who else but the judge hears so much litigation—upon this premise who else but the judge is more qualified to render an opinion.

These thoughts are founded in valid reason. The effect and impact of the trial judge is surely great. If his “*slightest* intimation may prove controlling”—then a statement that the damages were “fantastic” surely did prove devastating.

This case is novel. There were two sets of lawyers for defendant, only one for appellant and no impartial judge.

The learned trial judge went overboard. His own prejudice and partiality completely permeated the courtroom and obviously, to libellant’s reversible prejudice, even the jury room.

The award of damages was extremely inadequate. The argument that the jury may have found contributory negligence and thereby reduced the plain-

tiff's recovery is destitute of merit. There was no contributory negligence and in view of the Court's erroneous and misleading instructions, prejudicial comments, and prejudicial conduct throughout the entire trial, it is virtually impossible to determine upon what basis the jury did, in fact, determine their award.

At the present time, the plaintiff has not had his day in court. This miscarriage of justice, we respectfully submit, can only be remedied by the awarding of a new trial.

Dated, San Francisco, California,

16 August, 1957.

MELVIN M. BELL,

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Attorneys for Appellant.

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v.

UNITED STATES OF AMERICA,
Appellee.

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

**I. STATEMENT OF JURISDICTION AND STATE
OF THE RECORD**

The appellant, JAMES NATHAN LOWERY, was indicted in the District Court of the United States for the Western District of Washington, Northern Division, in cause No. 49515, on September 12, 1956.

The indictment was framed in eight counts, alleging violations of the following sections of the federal narcotic laws at different times on May 16, 1956 — Section 174, Title 21, United States Code; Section 4705(a), Title 26, United States Code; and Section 4704(a), Title 26, United States Code.

Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the provisions of Section 3231, Title 18, United States Code. Inasmuch as the indictment charged the appellant with having illegally received, concealed, sold and given away the narcotic drugs in question at Seattle, Washington, venue was properly laid in said District Court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and Section 3237, Title 18, United States Code.

Trial by jury was had, and a verdict of guilty was returned on all eight counts on January 4, 1957. Sentence was imposed and notice of appeal was filed on January 18, 1957.

The jurisdiction of this Court to review the judgment of the District Court is conferred by the provisions of Section 1291, Title 28, United States Code.

Though the appellant gave notice of appeal on January 18, 1957, the docket fee was not received by

this Court until August 21, 1957. Thereafter, and on October 15, 1957, this Court endorsed an order granting appellant's request to proceed on typewritten transcript of the trial court proceedings and typewritten briefs.

Since that date appellant has filed and served a typewritten brief, but has furnished no transcript of the trial court proceedings except for a transcription of the proceedings occurring at the time the trial court denied his motion for new trial and imposed judgment and sentence.

However, we are not at quite as impossible a situation as would normally be the case where there was no transcript of the trial proceedings inasmuch as at least some of what appellant now cites as error relates to pretrial matters presently before this Court as inclusions in the District Court Clerk's transmission of original papers, or to other issues determinable without recourse to all the testimony.

II. STATEMENT OF APPELLANT'S CONTENTIONS

Appellant contends that the Government should never have been permitted to bring him to trial because the evidence seized from his person and his premises on May 16, 1956, should have been suppressed.

His argument in this regard is that the evidence was seized pursuant to a search warrant which was only obtained on the basis of a perjured affidavit made before the United States Commissioner, and furthermore that the search was actually made on premises other than those specified and resulted in a seizure of objects other than those specified in the warrant.

In addition, appellant claims, assuming that he should have been tried, that he was denied a fair trial. His argument here raises three points — one, that his trial was unfairly conducted because the Government informant was not present; secondly, his trial was unfair because the Government was permitted to use the illegally seized evidence earlier alluded to; and finally, a fair trial was denied him because of the prejudicial testimony of a federal narcotic agent.

III. SUMMARY OF APPELLEE'S ARGUMENT

We contend that the affidavits made by the informant, C. B. Mitchell, and narcotic agent Charles Dupuis, on May 16, 1956, provided a proper basis for issuance of the search warrant and that such affidavits were truthful in every respect. Furthermore, we state unequivocally that the search was conducted only on the premises described in the search warrant, and that all property and objects seized were legally obtained under the search warrant or as an incident

to the lawful arrest of the appellant made pursuant to the warrant of arrest and executed at the same time.

It is also our position that the appellant received a fair trial in every respect, that he was properly confronted by his accusers, and was convicted by the overwhelming conclusiveness of correctly received evidence. And, finally, we are satisfied that what is charged as prejudicial was but a non-maliciously inspired fleeting incident properly stricken by the trial court which in the context of these proceedings had no influence upon the jury's verdict.

IV. APPELLEE'S ARGUMENT

Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:

"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

In this case conformity with the foregoing was absolute, and the affidavits of Mitchell and Dupuis stated facts conclusively establishing probable cause for believing the existence of grounds on which the warrant was issued. The affidavits themselves

are included in the commissioner's transcripts filed with the District Clerk for the Western District of Washington on June 20, 1956. These transcripts, which are included among the items forwarded to this Court by the District Clerk for the Western District of Washington, disclose that both affiants appeared before the commissioner at a time only one or two hours after the special employee-informant had been at the particular premises as described in the search warrant and on those premises had purchased narcotics from the appellant.

The affidavit of Mitchell states fully and completely all of the circumstances relating to the sale of narcotics to him by the appellant and goes into background information with regard to his contacts with the appellant during the period of time preceding the transaction of May 16, 1956. Agent Dupuis in his sworn affidavit details very explicitly the part that he played in the purchase of narcotics as made by Mitchell from the appellant and sets forth all of his observations of the special employee together with his search of him before the purchase and a search of him immediately thereafter. There can be no question but what, on the basis of these two sworn affidavits, the United States Commissioner properly found probable cause existed to believe that heroin hydrochloride was on the person and on the premises as set forth in the body

of the search warrant itself. At all times material, both affiants were duly and properly under oath.

The search warrant itself also forms a part of these commissioner's transcripts now before this Court. This search warrant shows that it was issued by the commissioner upon the affidavits given and as referred to herein, and authorized a search for heroin hydrochloride at an apartment at the premises of 614 Weller Street occupied by Lowery, and described as unnumbered and unlettered, but entered through the door immediately to the left of the stairway which enters from Weller Street (first floor above the street level), and further authorized a search of appellant's person.

Also included among the papers transmitted to this Court by the District Court Clerk is another affidavit of Charles F. Dupuis, the narcotic agent who appeared before the commissioner, and one of James M. Clark, the deputy marshal who accompanied the narcotic agents at the time of search and seizure, which affidavits were filed with the District Court at the time the appellant herein made his motion to suppress prior to trial. Both of these affidavits categorically state that only the described premises and the person of the individual named, this appellant, were searched.

A further fact pointed out in both of these affidavits is that Deputy Marshal Clark was also in possession of a warrant of arrest for appellant. Thus the seizure of the small measuring spoon containing traces of heroin hydrochloride at the described premises and the seizure of the thirty-five dollars marked United States currency furnished to the informant to purchase narcotic evidence from appellant were simply seizures made incidental to lawful arrest.

At the time of trial, the Government produced a chemist, four members of the narcotic detail of the Seattle Police Department, two federal narcotic agents, and the district supervisor of the Bureau of Narcotics. There was a wealth of evidence which, of course, could only be fully reflected by examination of the full trial court proceedings, but it is certainly self evident that the absence of the special employee-informant could not operate so as to make prosecution untenable as appellant now maintains. A subpoena was directed to the special employee at his last known address, the Oregon State Hospital, Salem, Oregon, and the "not found" return of the marshal is also included, as the 21st item, among the papers forwarded by the District Clerk.

There is no need to review appellant's claim that illegally seized evidence was improperly introduced

during trial inasmuch as this claim is framed no differently than that already discussed relating to the search and seizure.

Appellant's final point of argument relates to a portion of Agent Dupuis' testimony during trial. In this regard, there is also included in the papers submitted by the District Clerk, as item No. 17, the Government's memorandum in opposition to appellant's motion for new trial. On the first page of that document we are made aware as to what matters Dupuis was testifying. He was relating a conversation between District Narcotic Supervisor Crisler, himself, and the appellant, JAMES NATHAN LOWERY, oftentimes referred to as Sonny.

Dupuis testified that the appellant inquired as to whether there was "anything he could do to help himself". Following this, the testimony of Dupuis continued:

"Sonny was talking about the maximum he would have to do and the minimum he would have to do and Mr. Crisler advised him in that our position was that he was a third time violator — —"

Motion for mistrial was made, the jury was excused, discussion ensued, and the motion was denied. The Court struck the answer of the witness and im-

mediately upon the jury's return admonished them as follows:

"Members of the jury, the Court is going to strike the last answer of the witness with respect to what Mr. Crisler said to him, or what consideration was being given by them in that conversation, and ask that you disregard it entirely and give it no credence whatsoever."

Was this stricken testimony so positively prejudicial as to have substantially influenced the verdict of the jury? We feel that this can best be answered by reviewing the language of the trial court at the time of denying the motion for new trial which appears on page 6 of the transcript excerpt submitted by appellant to this Court. The trial court stated as follows:

"THE COURT: Mr. Goodloe, I have considered that matter. I don't wish to indicate that a statement like that by a witness is not serious. If it were not serious, the Court wouldn't even strike it, perhaps.

"On the other hand, the Court has to weigh, on a motion for a new trial based on that type of error, whether or not in view of the striking of the testimony and the admonition given the jury to disregard it, whether in view of all the testimony and the balance of the trial, over all, was the Defendant afforded a fair and impartial trial.

"Bearing that in mind and having in mind the nature of the testimony which was rather — on the part of the Government — rather voluminous, I thought, and particularly in view of the lack of a defense, actually — this case was submitted solely on the Government's proof. I feel that the

Defendant did have a fair trial and that the motion for new trial should be denied.”

This Court of Appeals has considered this almost identical situation before, and has on that occasion ruled that prompt action by the trial court operates to cure any error. This view was very fully expressed in the decision in the case of *Stoppelli v. United States*, 183 F. 2d 391, 394, 395 (9 Cir. 1950), cert. denied 71 S.Ct. 88. The opinion therein sets out two, and not just one, seemingly volunteered answers by a Government witness in the following language:

“Appellant claims he was deprived of a fair trial by the alleged misconduct of the government fingerprint witness, Greene, in volunteering answers. The portion of the record pertaining to this matter follows:

‘Q. Now how did you come to that conclusion that the print on the envelope is the print that belonged to John Stoppelli, the defendant?

‘A. We have a national book every district supervisor in the country, in the Narcotics Bureau, has a national book published by the Narcotics Bureau, all of the major known—’

‘A. In my opinion he grasped it this way (indicating) which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type —.’

“There is no merit in this complaint. The trial judge fully covered the matter by immediate appropriate instructions. We hold the incident to have had no substantial adverse effect upon the

fairness of the trial. It was but a transitory incident not proximately derogating from the intrinsic fairness of the trial. In a similar situation, the Court of Appeals of the Third Circuit ruled as we do. *United States v. Curzio*, 179 F. 2d 380. See also, *Marsh v. U. S.*, 3 Cir., 82 F. 2d 703."

The recent Second Circuit case of *United States v. Apuzzo*, 245 F. 2d 416 (1957), is entirely devoted to this type of situation; namely, a statement of a Government witness disclosing a prior conviction for the same offense as that charged in the case on trial. It is there at page 425 that the test we have set up for ourselves is posed.

"The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' *Kotteakos v. United States*, 1946, 328 U.S. 750, 762, 764-765, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557."

Throughout the *Apuzzo* decision, great emphasis is laid on the action of the trial court which, in the instant situation, was the immediate and forthright statement to the jury properly reiterated in the general instructions in a manner to not unduly emphasize the testimony. As Judge Waterman states in conclusion in the *Apuzzo* case, *supra*, at page 427:

"The erroneous introduction of an alleged statement by defendant that he had been previously arrested for a similar activity may be considered of such an exceptionally prejudicial character as to necessitate a new trial. See, e.g., *United States v. James*, *supra*. But the general rule is that where evidence is erroneously admitted the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. *United States v. Giallo*, 2 Cir., 1953, 206 F. 2d 207, affirmed 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421; *United States v. Curzio*, 3 Cir., 1950, 179 F. 2d 380; *Marsh v. United State*, 3 Cir., 1936, 82 F. 2d 703; *Stoppelli v. United States*, 9 Cir., 1950, 183 F. 2d 391; *Samish v. United States*, 9 Cir., 1955, 223 F. 2d 358. I believe that the circumstances of this case warrant the application here of that general rule."

V. CONCLUSION

Because we believe that the appellant was accorded a fair trial and was convicted by the overwhelming weight of substantial evidence, we ask that the judgment be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY

United States Attorney

MURRAY B. GUTERSON

Assistant United States Attorney

No. 15675

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JULIA MAE THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT
JULIA MAE THOMAS.

MINSKY & GABER,

By BERNARD W. MINSKY,
608 South Hill Street,
Los Angeles 14, California,
Attorneys for Appellant.

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U.S. COURT OF APPEALS

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No. 15675

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULIA MAE THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT JULIA MAE THOMAS.

Jurisdictional Statement.

I.

Jurisdiction of the District Court.

18 United States Code, Section 3231, provides that:

“The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States.”

Appellant was charged in the United States District Court for the Southern District of California, Central Division, in Indictment No. 25712 of violation United States Code Title 21, Section 174. (Illegal sale of narcotics.) [Tr. p. 1.]

II.

Jurisdiction of This Court Upon Appeal to Review the Judgment.

28 United States Code, Section 1291, reads:

“The Court of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . except where a direct review may be had in the Supreme Court.”

28 United States Code, Section 1294, reads, in part:

“Appeals from reviewable decisions of the District and territorial Courts shall be taken to the Court of Appeal as follows: 1. From a District Court of the United States to the Court of Appeal for the Circuit embracing the district;”

Appellant filed her Notice of Appeal on May 24, 1957 from the Judgment entered by the District Court on May 20, 1957. [Tr., p. 39.]

Statement of the Case.

Appellant was accused of the illegal sale of narcotics, violation of U. S. C. Title 21, Section 174, in an indictment returned on February 27, 1957, No. 25712. On March 18, 1957, appellant entered her plea of not guilty to the offense charged. Trial was had on May 2nd and 3rd, 1957, at which time appellant was convicted by a jury of the offense alleged in the indictment. On May 20, 1957, appellant was sentenced to a period of imprisonment of twenty years and to pay a fine to the United States in the sum of \$5,000.00. [Tr. p. 36.]

The testimony brought out at the trial was that of the Federal Narcotics Agents who testified that they had purchased narcotics from appellant, and in defense, the only

testimony brought out by appellant was her denial of the transactions. At this time, we make no question as to the sufficiency of the evidence to sustain the conviction. However, during the pendency of the trial, appellant's sole trial counsel, Philip S. Schutz, asked leave of Court for early adjournments on two grounds, one that he was not in good health, and two, that he wished additional time to confer with his client over certain developments in the case that had occurred at the trial. Both these requests for adjournment were reasonable under the facts, and trial counsel did not request more than a short respite. The trial Judge denied the request for early adjournment and forced trial counsel to proceed with his defense at the trial. [Rep. Tr. of Proceedings pp. 23, 24; pp. 96-100.] Appellant bases her appeal on the ground that the denial of a reasonable request for an early adjournment under the circumstances of this case, considering the nature of the case, and the penalties involved, was an abuse of discretion upon the part of the trial Court.

The first question involved in this appeal is, whether the appellant was denied a fair trial by the ruling of the Court denying appellant's Motion for an Early Adjournment of the trial after appellant's counsel, Mr. Schutz, became ill, but was forced to continue with the defense of appellant.

The second question presented is whether the Court abused its discretion in denying appellant's Motion for Early Adjournment on the ground that he needed further time in which to prepare his defense, in view of the seriousness of the charge and the penalties involved for violation of the Federal Narcotics Laws.

Specifications of Error.

I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR EARLY ADJOURNMENT ON THE GROUND OF ILLNESS OF COUNSEL.

II.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR EARLY ADJOURNMENT ON THE GROUND THAT COUNSEL NEEDED MORE TIME TO PREPARE ITS DEFENSE.

ARGUMENT.

The Denial of Appellant's Motion for Early Adjournment of the Trial After the Illness of Her Counsel and in Order to Further Prepare Her Defense, Deprived Appellant of the Effective Aid and Assistance of Counsel of Her Own Choosing, in Violation of the Fifth and Sixth Amendment of the United States Constitution.

(The two grounds of this Appeal, illness of trial counsel, and the need for further time for preparation of the defense, are so interwoven under the facts of this case, that appellant's arguments will be directed to both under the same general heading of denial of effective assistance of counsel, rather than to have two separate headings and arguments.)

On Thursday, May 2, 1957, at the afternoon session of the appellant's trial, Mr. Schutz, appellant's sole trial attorney, asked the Court for early adjournment on the ground that he was not feeling well. [Rep. Tr. pp. 23, 24.] After the case had been on trial all afternoon and late that afternoon, after the Government had rested its case and the defense was about to begin on its case, Mr. Schutz again informed the Court of his illness and requested that

he not have to go on further that day. [Rep. Tr. pp. 96-100.] The Court did not seem to be disposed to grant Mr. Schutz' request and Mr. Schutz added further reasons for his wish for an adjournment, in that he felt that he required at least the overnight period so that he might discuss the case with his client and prepare additional evidence and defenses to meet the Government's case. It was after 4:00 P.M. when the second request was made. [Rep. Tr. p. 101.] The trial Judge refused to postpone the case until the next day, and insisted Mr. Schutz continue, which Mr. Schutz did. [See Rep. Tr. pp. 23, 24; pp. 96-100.]

It is submitted that the trial Judge's refusal to grant the modest continuance requested by defense counsel was an abuse of discretion and under all the circumstances of the case, in view of the severity of the penalty actually imposed, and, of course, the seriousness of the nature of the indictment itself, this failure to grant a continuance was a violation of defendant's Constitutional rights to "assistance of counsel" as provided in the Sixth Amendment to the Constitution of the United States.

It is submitted that appellant was denied the effective aid and assistance of her trial counsel and therefore, in effect, was denied the assistance of counsel of her own choosing. [See affidavit of counsel and appellant in Appendix.]

The Constitutional right of an accused to have assistance of counsel contemplates effective assistance. Hence, the right is abridged when counsel cannot be effective because he is feeling ill during the trial.

United States v. Bergame, 154 F. 2d 31.

While a reading of the Transcript may not show, in an obvious way, that defendant did not have effective aid of counsel, still, such a showing is not required. If defendant is deprived of the effective assistance of counsel, that is sufficient for an Appellant Court to reverse, since it is not required that the defendant prove affirmatively the exact prejudice produced by such deprivation.

Glasser v. United States, 315 U. S. 60, 71, 62 S. Ct. 457, 465;

United States v. Venuto, 182 F. 2d 519.

The accused's rights to effective assistance of counsel is too fundamental a right to permit a Court to indulge in nice calculations as to amount of prejudice arising from its denial.

Butzman v. United States, 205 F. 2d 343;

Glasser v. United States, *supra*.

Where counsel becomes ill during the course of a trial, it is an abuse of discretion to deny a Motion for a reasonable continuance where there are no associate counsel to continue the case. And this would be especially so in a criminal case where the penalty upon conviction is as great as twenty years imprisonment.

22 *Corpus Juris Secundum* 748, Section 484(b) and cases cited;

17 *Corpus Juris Secundum* 217, Section 36 and cases cited;

People v. Davis, 48 Advance Cal. 239.

Appellant candidly admits that trial counsel did not vociferously insist upon his motion being granted. How-

ever, it can be seen from the remarks of the trial Judge, that such motion would have been peremptorily denied had it been pursued any further. [Rep. Tr. pp. 96, 97.]

The language of *Coplon v. United States*, 191 F. 2d 749, 760, is apropos of this case:

“A defendant in a criminal case may not legally be found guilty except in a trial in which his Constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty.”

If trial counsel had not become ill, appellant admits the trial Court would not have abused its discretion in denying appellants motion for an early adjournment to further prepare her defense. However, under all the circumstances surrounding this trial, and especially the fact that trial counsel became ill, it was an abuse of discretion for the trial Court to force counsel to continue with the defense. While the ability to think on his feet and adjust to the many twists and turns that a criminal trial takes is the mark of the competent attorney, and certainly Mr. Schutz is competent, where counsel advises the court that he is sick, and where the stakes are so high (twenty years in the Penitentiary) it would appear that natural justice and due process of law would permit, nay, require, at least the short adjournment requested.

Conclusion.

Because of the fact that appellant's trial counsel became ill during the course of the trial, and also because trial counsel advised the Court that he needed a short continuance in order to more adequately prepare his defense, and the fact that the Court denied said requests, appellant was denied the effective assistance of counsel as required by the sixth amendment of the United States Constitution and therefore was denied a fair trial in contravention of the Due Process clause of the fifth amendment to the United States Constitution.

WHEREFORE, appellant requests this Honorable Court to reverse the judgment below and grant her a new trial.

Respectfully submitted,

MINSKY & GARBER,

By BERNARD W. MINSKY,

Attorneys for Appellant.

APPENDIX.

Affidavit of Phillip S. Schutz.

In the United States Court of Appeals for the Ninth Circuit, State of California.

Julia Mae Thomas, Appellant, vs. United States of America, Appellee. No. 15675.

PHILLIP S. SCHUTZ, being first duly sworn, deposes and says:

That he was trial counsel for the defendant in the above matter, JULIA MAE THOMAS. That after the case was called for trial and during the trial, your affiant, on two occasions, requested the Trial Judge to adjourn at an early hour [P. S. S.], because your affiant felt sick and nauseous. Your affiant had a history of this type of illness and realizes that it comes upon him suddenly without prior notice. Your affiant has been told by his doctors that this particular sickness is the result of tension and nervous strain and that while it is brief in duration, it does require a rest before it passes.

That when your affiant's request for continuance was denied, your affiant continued with the defense to the best of his ability but there were times during the course of the trial when your affiant felt lightheaded, giddy and nauseous. This affected his proper concentration upon the examination of witnesses and also affected your affiant's ability to communicate with his client. Your affiant had a difficult time in discussing the case as it progressed during the trial with his client, and, therefore, your affiant feels that under the circumstances he did not present his defense to the best of his normal ability.

PHILIP S. SCHULTZ,

PHILLIP S. SCHUTZ.

Subscribed and sworn to before me this 11th day of October, 1957.

ROBERT BARNETT,

Notary Public in and for said County and State.

Affidavit of Julia Mae Thomas.

In the United States Court of Appeals for the Ninth Circuit, State of California.

Julia Mae Thomas, Appellant, vs. United States of America, Appellee. No. 15675.

JULIA MAE THOMAS, being first duly sworn, deposes and says:

That she is the appellant in the above matter. That during the course of her trial, it became obvious to her that her attorney, Phillip S. Schutz, was not feeling well. That during conversations with her attorney, he told her that he had a feeling of nausea, lightheadedness and giddiness, and told your affiant that he did not feel that under the circumstances he could properly conduct her defense. That there were times during the course of the trial when your affiant and her attorney were conversing that it appeared to your affiant that Mr. Schutz was not listening to her and did not understand what she said. At other times during the trial, the conversation of Mr. Schutz was unintelligible to your affiant.

That in the opinion of your affiant, Mr. Schutz was not able to give an effective defense.

JULIA MAE THOMAS,
JULIA MAE THOMAS.

Subscribed and sworn to before me this 11th day of October, 1957.

ROBERT BARNETT,
Notary Public in and for said County and State.

No. 15675

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULIA MAE THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

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600 Federal Building,
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No. 15675
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JULIA MAE THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment after conviction following trial by jury under Title 21, United States Code, Section 174. Jurisdiction of this Honorable Court on appeal is conferred by virtue of the provisions of Title 28, United States Code, Section 1291 and Section 1294, and Rules 37 and 39, Federal Rules of Criminal Procedure.

II.
STATEMENT OF THE CASE.

In the Indictment, the grand jury charged, in effect, that after importation appellant knowingly and unlawfully sold approximately 44 grains of heroin to Justin Burley, a deputy sheriff in the Los Angeles County

Sheriff's Department. After plea of not guilty was entered, trial by jury was had on May 2 and May 3, 1957. This trial resulted in conviction of appellant of the offense alleged in the Indictment. Thereafter, on May 20, 1957, appellant was sentenced to pay a fine of \$5,000 to the United States and to imprisonment for a period of twenty years. [Clk. Tr. p. 36.]

Appellant raises no issue as to the sufficiency of the evidence.

During the course of the trial, on May 2, 1957, counsel for the defense, Philip S. Schutz, Esq., suggested adjournment "at any reasonable early hour" to the court, on the ground that he was feeling poorly. Mr. Schultz did *not* move the court to adjourn any earlier than usual or customary, however. The court neither denied nor acquiesced in counsel's suggestion at that time, but reserved its decision. [Rep. Tr. p. 23, line 22, to p. 24, line 6.]

Thereafter, during the afternoon of the same day, May 2, 1957, Mr. Schultz again broached the subject of continuance on the ground of his physical condition. At this time Mr. Schultz prayed that the court grant a "three or four minute recess." This motion was *granted* and a five minute recess was had. [Rep. Tr. p. 96, line 25, to p. 97, line 18.]

A short time later, Mr. Schultz again moved the court for a continuance until the following morning. This motion was made *on the ground that Mr. Schultz contemplated changing his course of defensive action and desired added time to confer with appellant.* After some exchange between counsel and the court, *Mr. Schultz altered his request to that of a "reasonable time."* The

court then inquired if fifteen or twenty minutes would suffice. After declaring his appreciation, *Mr. Schultz then stated that fifteen minutes would be sufficient to permit him to come to a decision.* Thereafter, the court granted to Mr. Schultz the fifteen minute recess requested. [Rep. Tr. p. 98, line 9, to p. 102, line 5.]

It is the above course of events upon which appellant bases her appeal, claiming therein abuse of the trial court's discretion, resulting in denial to her of a fair trial.

III.

ARGUMENT.

A. The Appellee Is Entitled to All Favorable Inferences Reasonably Drawn From the Record.

It is well settled in the law that the burden of showing the essential unfairness of a trial must be sustained by the appellant. Further, it must be shown not as a matter of speculation, but as a demonstrable reality. Thus, the burden of demonstrating both error and prejudice is on the appellant.

United States ex rel. Darcy v. Handy, 351 U. S. 454, 76 S. Ct. 965, 100 L. Ed. 1331 (1956);

Borgia v. United States (9 Cir. 1935), 78 F. 2d 550; cert. den. 296 U. S. 615; 56 S. Ct. 135; 80 L. Ed. 436;

Hunt v. United States (8 Cir. 1956), 231 F. 2d 784.

It is also the rule that Appellate Court will indulge all reasonable presumptions in support of the rulings of the trial court. In addition, it will draw all inferences permis-

sible from the record, and will consider the evidence in the light most favorable to the prosecution.

Pasadena Research Laboratories v. United States (9 Cir. 1948), 169 F. 2d 375; cert. den. 335 U. S. 853; 69 S. Ct. 83; 93 L. Ed. 401;

United States v. Albanese (2 Cir. 1955), 224 F. 2d 879; cert. den. 350 U. S. 845; 76 S. Ct. 87; 100 L. Ed. 753.

In the instant appeal appellant not only fails to carry this burden, but in fact concedes that the record itself will not suffice: “. . . a reading of the Transcript may not show, in an obvious way, that defendant did not have effective aid of counsel . . .” (App. Op. Br. p. 6.) It is this admission relative to the record that is important here. If neither the record nor appellant present this Honorable Court on appeal with any facts whatsoever to support the appeal, then appellant must fail; and particularly so where a review of the record as a whole amply substantiates the rulings of the trial court. Such is the instant case.

B. The Constitutional Right to Counsel Is Substantial, Not Formal.

It is well established that the crux of the right to assistance of counsel granted by the Sixth Amendment to the Constitution is a matter of substance, not form.

United States Const., Amend. VI.

In *United States ex rel. Marino v. Holton* (7 Cir. 1955), 227 F. 2d 886; cert. den. 380 U. S. 1006; 76 S. Ct. 650; 100 L. Ed. 868, the court said, at page 896:

“Due process of law, as we comprehend it, does not necessarily include or exclude representation by coun-

sel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel. Due process, or the lack of it, is based upon substance and not form."

See also:

Lisenba v. California, 314 U. S. 219, 236; 62 S. Ct. 326; 86 L. Ed. 166 (1941);

Chambers v. Florida, 309 U. S. 227; 60 S. Ct. 321; 84 L. Ed. 716 (1940);

Powell v. Alabama, 287 U. S. 45; 53 S. Ct. 55; 77 L. Ed. 158 (1932).

This constitutional right of an accused to assistance of counsel has been further defined to require effective assistance, as distinguished from the mere opportunity for conferences and preparation.

United States v. Bergamo (3 Cir. 1946), 154 F. 2d 31;

Beckett v. Hudspeth (10 Cir. 1942), 131 F. 2d 195.

Under the rule requiring effective representation to satisfy the Constitution, absence of effective representation means representation so lacking in competence that it becomes the duty of the court or the prosecution to correct it.

Diggs v. Welch (D. C. Cir. 1945), 148 F. 2d 667; cert. den. 325 U. S. 889; 65 S. Ct. 1576; 89 L. Ed. 2002.

C. Appellant Misconceives the Law Relative to Showing Lack of Effective Assistance.

Appellant has cited *Glasser v. United States*, 315 U. S. 60; 62 S. Ct. 457; 86 L. Ed. 680 (1941), and *United States v. Venuto* (3 Cir. 1950), 182 F. 2d 519, to support her thesis that she need make no showing to support her contention she was deprived of effective assistance of counsel. (App. Op. Br. p. 6.)

It is respectfully submitted that appellant here misconceives the law in this regard in that she has confused the *lack of effective assistance with the precise prejudice in which such lack of assistance results*. It is conceded that the exact prejudice *resulting* from a denial of effective assistance of counsel need not be shown.

Glasser v. United States, supra;

United States v. Venuto, supra.

However, these cases cannot in any way be construed to relieve the appellant of the responsibility for showing at least *some* facts which, in the circumstances, might constitute such a denial of effective assistance in the first instance.

By necessary implication, *appellant must first show she was in fact deprived of effective assistance of counsel* before she may rightfully claim excusal from showing the *exact prejudice* in which such denial *resulted*. In the instant appeal before this Honorable Court, appellant's only offering is a nice statement of the law:

"If defendant is deprived of the effective assistance of counsel, that is sufficient for the Appellate

Court to reverse, since it is not required that the defendant prove affirmatively the exact prejudice produced by such deprivation.” (App. Op. Br. p. 6.)

This Honorable Court’s attention is invited to the first word in the above statement. The word is “If”. And it serves to impose a *condition precedent* to the privilege of not being required to show the exact prejudice which may have resulted from a denial of effective assistance of counsel. The condition precedent is that *appellant must first set forth facts showing she was in fact denied effective assistance of counsel*. At that point only can she stop and claim the right; only then does the right mature.

Thus, in lieu of any showing whatsoever to establish the existence *in fact* of a denial of effective assistance of counsel, appellant has substituted a bald and self-serving *assumption* which does no more than *conclude*, without foundation, the very fact in issue, to wit: whether appellant was in fact denied effective assistance of counsel. Appellee is confident that such semantic gyrations are not acceptable substitutes for fact and reason in the law. Nor will they confuse this learned and Honorable Court on appeal.

D. The Granting of Continuances Is a Matter Within the Sound Discretion of the Trial Court.

In *Franklin v. South Carolina*, 218 U. S. 161; 30 S. Ct. 640; 54 L. Ed. 980 (1910), the court said, at page 168:

“It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action

of the trial court in such a case a denial of due process of law.”

See also:

Neufield v. United States (D. C. Cir. 1941), 118 F. 2d 375; cert. den. 315 U. S. 798; 62 S. Ct. 580; 86 L. Ed. 1199;

Jones v. Green, 168 P. 2d 418; 74 Cal. App. 2d 223 (1946).

This rule is equally applicable to the granting of continuance on the ground of the illness of counsel.

Lias v. United States (4 Cir. 1931), 51 F. 2d 215; cert. granted 284 U. S. 604; 52 S. Ct. 32; 76 L. Ed. 518; affirmed 284 U. S. 584; 52 S. Ct. 128; 76 L. Ed. 505.

When counsel whose illness is the ground of the motion for continuance is himself in court presenting and urging the motion, the court is authorized, in the determination of the question whether the condition of counsel is such that the interests of justice demand a postponement of the case, to take into consideration the general appearance of counsel and the mental and physical vigor displayed in counsel's presentation. *When such a motion is overruled, the Appellate Court may take into consideration what appears in the record as to the manner in which counsel conducted the case in determining whether there has been such an abuse of discretion as to require reversal of the judgment.*

Rawlins v. State, 124 Ga. 31; 52 S. E. 1 (1905).

In the *Rawlins* case, *supra*, the court said, at pages 11 and 12:

“The illness of counsel contemplated by the law is such a physical condition, resulting from sickness, malady or disease, as would prevent counsel from properly attending to his duties as such. *It does not mean any mere indisposition, but indisposition of such character as to disqualify a person from the discharge of those delicate and responsible duties which devolve upon counsel in the trial of a case.* The determination of whether such an illness in fact exists as is contemplated by the law, is reposed in the trial judge before whom the motion for a continuance is made * * * If counsel who makes the motion is himself present in court, making and urging the motion in his own proper person, the judge may determine the question by the condition of counsel as it appears to him. * * * If the statement of counsel as to his condition is considered in its entirety, it is apparent that he was not ill at all within the sense of the statute * * * He was merely tired, and this condition of body and mind is not sufficient to postpone the trial of the case unless it reaches the point where mind and body are so exhausted that the duty in hand cannot be performed with justice to those to whom the duty is due * * * *But a case must not be postponed on account of the physical condition of counsel being affected by the work in the line of his profession or otherwise, unless the physical condition brought about by the work is such that further effort would imperil his health or an attempt to perform the duty under such circumstances would result in injustice to those interested in the performance of a duty owed to them.* This matter, as all matters relating to continuances of cases upon similar grounds, is addressed to the

discretion, judgment and humanity of the trial judge, and nothing appears in the record which authorizes us to say that this discretion has been abused in the present case. While we have no doubt that the motion to continue was made in the utmost good faith, and counsel really believed at the time that he was in such * * * condition that he could not do justice to his client, still, from all that appears in the record we think, with the trial judge, that our brother was mistaken as to what was really his condition. It is apparent from the record * * * that counsel conducted this case with his usual skill and ability, and if any injustice has been done to his client it has not been made to appear.” (Emphasis ours.)

In many respects the applicability of the above quotation is such that it might have come from this Honorable Court in the instant case.

It is thus clear that the sickness of counsel warranting a continuance must be bona fide, *not merely the product of the lawyer's profession, such as nervous tension*, and in any event sufficient to render counsel incapable of making a competent defense.

Hanye v. State, 99 Ga. 212; 25 S. E. 307 (1896).

When, however, the defendant in a criminal proceeding is represented by counsel of his own choice, and he and his counsel are heard at every stage of the proceedings, then the constitutional requirement as to assistance of counsel has been met. *It is only when the action of counsel in the presence of the court reduces the trial to a travesty on justice, that it may be considered on a question of denial of due process.* Where the record fails to show that the assistance provided in fact amounted to no representation or assistance such as would reduce the

trial to a travesty on justice, or a farce or a sham, then the defendant cannot be said to have been denied due process of law.

Hendrickson v. Overlade (N. D. Ind. 1955), 131 Fed. Supp. 561.

E. Counsel's Physical Condition Was Not Such as Would Necessitate a Continuance Within the Above Rules.

In the instant case counsel appeared at every stage of the proceedings in spite of alleged illness.

Where counsel continues to appear and represent the defendant at every stage of the proceedings, in spite of illness, then it cannot be said that the trial court abused its discretion in refusing a continuance.

People v. Davis, 276 P. 2d 801; 43 Cal. 2d 661 (1954); cert. den. 349 U. S. 905; 75 S. Ct. 581; 99 L. Ed. 1241.

Indicative of the actual condition of counsel is the transcript where counsel himself volunteered to continue:

"Mr. Schutz: My inquiry was not to the case in particular, but I am not aware of your Honor's wishes regarding adjournment, but I will state to the court that *I am not feeling as well as I might* and if we could adjourn at any reasonable early hour I might be able to continue. I don't mean earlier than customary, but I should like to get away so I can help myself a little bit. I am feeling very poorly *and I will work through as long as your Honor directs me to.*

The Court: Let me see how we get along.

Mr. Schutz: I will do my best to get along."
(Emphasis ours.) [Rep. Tr. p. 23, line 22, to p. 24, line 6.]

Appellee respectfully submits that such is not the plea of a gentleman in any way incapacitated by illness. Nor did counsel press the suggestion in any way. Indeed, counsel himself describes it most accurately as being “the result of tension and nervous strain”—the typical trademarks of a court trial, and as such the inevitable by-products of the lawyer’s work in his profession. (Appendix, App. Op. Br. p. 1.)

The standard by which abuse of the trial court’s discretion and the fairness of the trial in the circumstances is to be determined is not how nervous counsel may have been, but *whether he was well enough to put on a competent defense. Hanye v. State, supra*. It is a question of *capacity* and whether the representation was such as to amount to no representation at all and thus constitute a travesty on justice. *Hendrickson v. Overlade, supra*.

In the present case, however, the record makes no mention of the extent to which counsel’s *capacity* or *competence* may have been impaired. At no time during the trial did counsel suggest the nature of his illness. In fact, counsel’s only word on the subject was merely that he felt “he did not present his defense to the best of his normal ability.” (Appendix, App. Op. Br. p. 1.) Clearly, counsel’s “normal ability” is not the test, in that it may or may not bear any relation to his competence and capacity in fact.

It is finally worthy of note that, after denial of the earlier motion, counsel in fact *was granted* every continuance he asked for, namely, one of five minutes and one of twenty-five minutes. The actual durations of five and twenty-five minutes were suggested by counsel himself. [Rep. Tr. p. 96, line 25, to p. 102, line 5.]

F. The Trial Court Did Not Err in Refusing to Grant the Original Continuance Requested by Counsel on the Ground of Illness.

It is clear from the record before this Honorable Court on appeal that appellant has failed to make any showing as she is required to do, first, that she was in fact denied effective assistance of counsel (see Argument, App. Br. Point “A” and “C” *supra*); second, that the nature of counsel’s illness was such as would incapacitate him within the established rules of law (see Argument, App. Br. Points “D” and “E” *supra*); or third, any way in which the defendant’s case could have been more adequately presented.

It is not an abuse of the trial court’s discretion to refuse a continuance where there is no particularization of any way in which the defense could have been more adequately presented.

Neufield v. United States, supra.

In the instant appeal, neither the Appellant’s Opening Brief nor the record before this Honorable Court on appeal make any mention of areas for improvement of counsel’s presentation. In truth and in fact, a review of the record as a whole, far from evincing any incompetence of Mr. Schutz such as would warrant reversal, shows a defense both spirited and eminently competent; and most particularly so if Mr. Schutz was not in fact feeling up to his “normal ability.”

In another case involving affidavits of illness later appended to the record, the court said:

“This affidavit is a rather remarkable document through which it is sought to accomplish a very unusual result. A careful examination of this entire record evinces no lack of ability or alertness on the

part of counsel for Hagan, either during or after the trial. * * * The record shows a careful trial and a spirited defense in the face of overwhelming proof of guilt. We think this ground should not be recognized.”

Hagan v. United States (8 Cir. 1925), 9 F. 2d 562.

It is respectfully submitted that this comment is eminently well suited to the present appeal, and in light of the facts it is clear that appellant received a completely fair trial within the requirements of the Sixth Amendment.

G. Appellant Ought Not Be Permitted to Raise the Objection of Lack of Effective Assistance of Counsel for the First Time on Appeal.

In a criminal proceeding the defendant cannot seemingly acquiesce in his counsel's defense of him, or lack thereof, and then, only after the trial has resulted adversely, have judgment set aside because of alleged incompetence, negligence or lack of skill of such counsel.

Lucas v. United States (N. D. W. Va. 1953), 114 Fed. Supp. 584.

See also:

United States ex rel. Darcy v. Handy, supra;

Tompsett v. State (6 Cir. 1944), 146 F. 2d 95; cert. den. 324 U. S. 869; 65 S. Ct. 916.

Appellee respectfully submits the above rule is and ought to be equally applicable to impairment of skill of counsel resulting from illness, where, as here, *the existence of such illness is known by the appellant.*

In the instant case it is clear that appellant well knew any infirmity from which Mr. Schutz may have been suffering, in that Mr. Schutz himself apprised her of that fact. In addition, she now relates certain observations made at the time. (Appendix, App. Ap. Br. p. 2.) Yet she said nothing in this connection at the trial.

It is respectfully submitted to this Honorable Court on appeal that in the circumstances, appellant's failure to raise the matter in the trial court constituted waiver of objection. Appellant's assertion that she was denied the right to effective assistance of counsel should properly have been presented to the trial court instead of being raised for the first time on appeal. Indeed, Title 28, U. S. C., Section 2225, expressly provides for such a hearing.

Butzman v. United States (6 Cir. 1953), 205 F. 2d 343; cert. den. 346 U. S. 828; 74 S. Ct. 50.

See also:

United States v. Hayman, 342 U. S. 205; 72 S. Ct. 236; 96 L. Ed. 232 (1952).

H. The Trial Court Did Not Err in Refusing to Grant Continuance for Lack of Time to Prepare.

In this regard, the only question is one of abuse of discretion in that the granting of such continuance is a matter within the sound discretion of the trial court. (See Argument, App. Br. Point "D" *supra*.)

In the appeal now before this Honorable Court there is no allegation that counsel was not granted sufficient time to prepare, such as would constitute deprivation of effective assistance. Nor is there anything in the record before this Honorable Court on appeal that would support such an allegation, had it been made.

The truth of the matter is that *counsel was, in fact, granted the continuance he requested for additional time to consult with appellant*. This continuance was for fifteen minutes and was acquiesced in as sufficient by counsel himself. [Rep. Tr. p. 98, line 9, to p. 102, line 5.]

Indeed, the only evidence even remotely relevant to this point was counsel's expression regarding a possible change of mind respecting his course, or, at very best, mild surprise. [Rep. Tr. p. 98, line 9, to p. 101, line 19.] It is respectfully submitted, however, that on the record now before this Honorable Court on appeal it is clear that not only did counsel have adequate time to prepare and consult with his client, but that he was, in fact, prepared to raise a competent defense. Surprise is no stranger to the courtroom, and counsel's desire to change his course cannot always be ground for continuance as a matter of right. There is nothing in the record before this Honorable Court on appeal that evinces any abuse of discretion in this regard by the trial court.

Indeed, appellee herself, admits that if counsel had not become ill, the trial court "would not have abused its discretion in denying appellant's motion for an early adjournment to further prepare her defense." (Argument, App. Op. B. p. 7.)

Accepting this position taken by appellant, and absent the illness as proper grounds here, there was no abuse of discretion. It is respectfully submitted that appellee has in fact shown that the illness here involved was not such as to warrant a continuance. Therefore it is clear that this issue is no more than a hollow shell. (See Argument, App. Br. Point "E".)

It thus becomes apparent that appellant's argument is in every respect without reason or substance.

IV.

Conclusion.

In light of the facts in the record before this Honorable Court on appeal, it seems apparent that this appeal is so lacking in merit or substance as almost to border on frivolity and sham.

Appellant offers no showing of facts which could in any way constitute denial of effective assistance of counsel such as would warrant reversal of the judgment. Appellant misconceives the law and misinterprets the facts. Appellant offers no showing of facts establishing the nature of counsel's illness as one which so incapacitated counsel as to require continuance within the established rules of law. Appellant offers no showing of facts which show any way in which counsel's defense could have been improved upon.

Appellant's sole offering is her own naked conclusion of the very fact in issue, and a reference to the fact that the "stakes ar eso high." (Argument, App. Op. Br. p. 7.) In this regard, appellee respectfully submits that the courts of law in this land are not to be likened to casinos or gambling houses. They are administered not by chance, but by fact and reason; and their object is not windfall, but is *justice*, for the lasting betterment of our land and our society.

With regard to appellant's contention that the trial court abused its discretion in refusing counsel further continuance for preparation of the defense, the record itself refutes the contention: *Counsel was in fact granted the very continuance he requested.* [Rep. Tr. p. 98, line 9, to p. 102, line 5.] Were this insufficient, appellant herself concedes that, absent the illness of counsel, there

would have been no abuse of discretion. (Argument, App. Op. Br. p. 7.) But *here* the illness of counsel was not the ground of counsel's motion. And even if it were, appellee has shown that this illness has not been shown to be such as would require reversal here. (Argument, App. Br. Point "E".)

Finally, a review of the record as a whole displays a masterful defense on the part of Mr. Schutz, in the face of overwhelming proof of guilt.

Thus, there can be no lingering doubt that the defendant did, in fact, receive "effective assistance of counsel" within the meaning of the law, and that the trial court acted properly within its discretion in its rulings on all matters of continuance.

Wherefore, appellee respectfully requests this Honorable Court to affirm the judgment below, and deny appellant's motion for a new trial.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
*Asst. United States Attorney,
Chief, Criminal Division,*

DAVID B. SCHEFRIN,
*Asst. United States Attorney,
Attorneys for Appellee, United
States of America.*

No. 15678

**United States
Court of Appeals**
for the Ninth Circuit

KINGMAN WATER COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**

FILED

1957 - 2 1957

No. 15678

United States
Court of Appeals
for the Ninth Circuit

KINGMAN WATER COMPANY, a Corporation,
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Transcript of Record

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District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee.

United States District Court,
District of Arizona

Civil No. 467 Prescott

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KINGMAN WATER COMPANY, KINGMAN,
ARIZONA,

Defendant.

COMPLAINT FOR REFUND
OF OVERCHARGES

1. This court has jurisdiction under 28 U.S.C. 1345, in that the United States of America is the plaintiff herein.

2. The Housing Authority of Mohave County was an agency of the County of Mohave authorized to operate housing projects, under lease, for the Federal Government, pursuant to a state statute, to wit, The War and Defense Housing Law, Appx. 5(B) of the 1952 Cumulative Supplement to the Arizona Code, 1939.

3. The defendant is a corporation doing business as a public utility at Kingman, Arizona. By a lease dated July 17, 1944, but effective as of July 1, 1944, the United States of America leased to the Housing Authority of Mohave County a housing project known as Vista Solana Homes, consisting of 31 buildings and containing 120 dwelling units.

Said Housing Authority agreed to operate said housing project, to sublet the housing units, and to pay to the United States, as rent, all net profits derived from the operation of said project. Said lease further provided, in Section 16 thereof, that the lessor, the United States of America, would be responsible for the negotiation and execution of contracts for water and electricity services and that the lessee would assume and discharge the obligations of the lessor and act as the representative of the lessor in dealing with the suppliers of utility services under any such contracts.

5. The United States of America entered into a contract with defendant Kingman Water Company for the supplying of water to the said Vista Solar project, at the rates specified by the published tariff of the defendant applicable to such service. The applicable tariff was Tariff No. 1 dated August 2, 1919, filed on behalf of the defendant by I. I. George. A copy of said Tariff No. 1 is attached hereto, marked Exhibit A, and made a part hereof by incorporation.

6. From May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solar housing project through four meters owned and installed by the United States of America. The quantities of water so delivered were reported and billed, for each monthly period, solely on the basis of the amounts appearing on said meters. Nevertheless the defendant made its charges as though there were a separate meter at each of the 120

housing units in the project. Each such bill made the charge, at the highest rate provided in the tariff, for users of less than 3,000 gallons, multiplied by 12. The defendant, in its monthly billings, made the further assumption, which was contrary to fact, that each and every one of the 120 units was occupied every month by a water user.

7. As a result of the erroneous billing practice hereinabove described, the defendant overcharged the plaintiff a total of \$15,824.33 during the period from May 20, 1944, to July, 1951. The defendant paid all of said billings except the amounts billed for June and July, 1951, which totaled \$1,011.14.

8. The plaintiff has fully performed all covenants and conditions on its part under the aforesaid contract between the United States of America and the defendant Kingman Water Company.

9. The plaintiff sought to obtain relief by an application to the appropriate state regulatory body, the Arizona Corporation Commission. Said Commission, however, ruled that it did not have jurisdiction of the controversy.

10. By reason of all the foregoing facts, the defendant is indebted to the plaintiff herein in the sum of \$14,813.19, interest upon each overpayment from the date thereof at the rate prescribed by the statutes of Arizona, and the costs of this action.

Wherefore, the plaintiff prays judgment against the defendant for \$14,813.19, interest upon each overpayment from the date thereof, the costs of this

Said Housing Authority agreed to operate said housing project, to sublet the housing units, and to pay to the United States, as rent, all net profits derived from the operation of said project. Said lease further provided, in Section 16 thereof, that the lessor, the United States of America, would be responsible for the negotiation and execution of contracts for water and electricity services and that the lessee would assume and discharge the obligations of the lessor and act as the representative of the lessor in dealing with the suppliers of utility services under any such contracts.

5. The United States of America entered into a contract with defendant Kingman Water Company for the supplying of water to the said Vista Solana project, at the rates specified by the published tariff of the defendant applicable to such service. The applicable tariff was Tariff No. 1 dated August 12, 1919, filed on behalf of the defendant by I. M. George. A copy of said Tariff No. 1 is attached hereto, marked Exhibit A, and made a part hereof by incorporation.

6. From May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana housing project through four meters owned and installed by the United States of America. The quantities of water so delivered were reported and billed, for each monthly period, solely on the basis of the amounts appearing on said meters. Nevertheless the defendant made its charges as though there were a separate meter at each of the 120

housing units in the project. Each such bill made the charge, at the highest rate provided in the tariff, for users of less than 3,000 gallons, multiplied by 120. The defendant, in its monthly billings, made the further assumption, which was contrary to fact, that each and every one of the 120 units was occupied every month by a water user.

7. As a result of the erroneous billing practice hereinabove described, the defendant overcharged the plaintiff a total of \$15,824.33 during the period from May 20, 1944, to July, 1951. The defendant paid all of said billings except the amounts billed for June and July, 1951, which totaled \$1,011.14.

8. The plaintiff has fully performed all covenants and conditions on its part under the aforesaid contract between the United States of America and the defendant Kingman Water Company.

9. The plaintiff sought to obtain relief by an application to the appropriate state regulatory body, the Arizona Corporation Commission. Said Commission, however, ruled that it did not have jurisdiction of the controversy.

10. By reason of all the foregoing facts, the defendant is indebted to the plaintiff herein in the sum of \$14,813.19, interest upon each overpayment from the date thereof at the rate prescribed by the statutes of Arizona, and the costs of this action.

Wherefore, the plaintiff prays judgment against the defendant for \$14,813.19, interest upon each overpayment from the date thereof, the costs of this

action, and such other and further relief as may be just and proper.

.....,

JACK D. H. HAYS,

United States Attorney for
the District of Arizona;

/s/ ROBERT O. ROYLSTON,

Assistant U. S. Attorney,
Counsel for Plaintiff.

Date: April 18, 1956.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and for its answer to the complaint on file herein admits, denies and alleges as follows:

I.

Said defendant admits the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of said complaint.

II.

Answering Paragraph 6 of said complaint, said defendant admits that from May 20, 1944, to July, 1951, it delivered water to said housing project through four meters owned and installed by the United States of America, and that the quantities of water so delivered were reported and billed for

each monthly period solely on the basis of the amounts appearing on said meters, and further that defendant made its charges as though there were a separate meter at each of the 120 housing units in the project, as alleged in said complaint. Said defendant admits that in its monthly billings it made the further assumption that each and every one of the 120 units was occupied every month by a water user. Further answering said paragraph, defendant alleges that at the time of the consummation of the agreement between it and plaintiff, it was agreed by and between plaintiff and defendant that because of the unavailability of water meters which had been caused by a shortage of materials during wartime, the plaintiff would furnish meters, and in the event meters were not available for each individual housing unit, water charges would be made on the basis of each individual unit.

III.

Answering Paragraph 7 of said complaint, defendant denies each and every allegation contained therein except the allegation that the defendant paid all of said billings except the amounts billed for June and July, 1951, in the total sum of \$1,011.14, and in that regard, said defendant alleges and admits that plaintiff paid all of the billings except the amounts billed for June and July, 1951, which total \$1,011.14.

IV.

Answering Paragraph 8 of said complaint, defendant denies that the plaintiff had performed all

covenants and conditions on its part under the aforesaid contract in that said plaintiff failed to supply water meters for each individual unit in said housing project.

V.

Answering Paragraph 10 of said complaint, defendant denies the allegations contained therein.

VI.

Further answering said complaint and as a further and separate and distinct defense thereto, said defendant alleges that the amount billed by defendant to plaintiff for water service to the residents of said Vista Solana homes has become an account stated in that for a long period of time after the billing of said accounts, plaintiff accepted said billings and paid the same and is now estopped to assert the incorrectness of said amount.

Wherefore, defendant prays that the complaint of the plaintiff on file herein be dismissed and that the defendant have and recover its costs herein expended.

/s/ BRUCE I. BISHOP,
Attorney for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed June 12, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 1, 1957

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly for trial this day. Robert O. Roylston, Esquire, Assistant United States Attorney, is present for the Government. Brice I. Bishop, Esquire, is present for the defendant.

Counsel for the defendant requests leave to amend answer.

It Is Ordered that the record show that in accordance with the motion of counsel for the defendant and, on stipulation of counsel for the plaintiff, the Court now manually amends defendant's answer by interlineation.

Plaintiff's Case

Plaintiff's Exhibit #1, a true and correct copy of the water rates of the Kingman Water Company as of August 12, 1919, from Corporation Commission, is admitted in evidence.

Paul M. Sapp is sworn and examined in the plaintiff's behalf.

Plaintiff's Exhibit #3, copy of letter of July 21, 1951, directed to the Kingman Water Company from the Public Housing Administration is admitted in evidence.

Plaintiff's Exhibit #4, recapitulation, is admitted in evidence.

Counsel for the defendant reads letter dated October 16, 1943, directed to Federal Public Housing Authority from Johannsen and Girard, Phoenix, Arizona, which is part of the Federal Housing Authority file Arizona 2-311, into the record.

Letter dated May 8, 1944, from Carl G. Krook addressed to Federal Public Housing Authority is read into the record.

The following exhibits are admitted in evidence:

Defendant's Exhibit A, Decision #27023-A

Plaintiff's Exhibit #5, Blueprint

Whereupon, the Government rests.

Defendant's Case

Defendant's Exhibit B, Deposition of Ira M. George, is admitted in evidence.

The following witnesses are now sworn and examined in defendant's behalf:

Donald George

Benjamin F. Golding

Defendant's Exhibit C, Paragraph IV, page 3, Rules and Regulations Domestic Water Companies, is admitted in evidence.

Thereupon the defendant rests.

Counsel stipulate that the ruling made by Kingman Water Company herein did not comply with

sub-paragraph (c) of Paragraph IV of Defendant's Exhibit C.

On stipulation of counsel,

Plaintiff's Exhibit #2, Contract, is admitted in evidence.

It Is Ordered that counsel for both sides be allowed ten days to file memoranda setting out their respective positions and that upon the filing of said memoranda the matter will stand submitted.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 25, 1957

(Prescott Division)

Honorable James A. Walsh, United States District Judge, Presiding.

The fact that a governmental agency was defendant public utility company's customer does not render the Arizona regulatory statutes inapplicable to the dealings between defendant and its customer. *City of St. George v. Public Utilities Commission*, 220 P. 720; 73 C. J. S., "Public Utilities," Sec. 41 (b) (3), p. 1087; 94 C. J. S., "Waters," Sec. 275 (c), p. 131. Any agreement between the customer and defendant for water service at a rate different from that filed by defendant with the Arizona Corporation Commission would be void. § 40-367 and 40-374, A. R. S. Any ambiguity in the filed rate, Plaintiff's Exhibit No. 1 in Evidence, must be resolved against defendant, since such rate was pre-

pared by defendant and submitted by defendant to the Corporation Commission for approval. So construed, the rate does not permit the charge of a monthly \$2.50 minimum per residence unit but, at most, a monthly \$2.50 minimum per meter.

The plaintiff is not estopped to recover the amounts charged and collected by defendant in excess of the lawful rate. *City and County of San Francisco v. U. S.*, 223 F. 2d 737; *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 383.

Counsel for plaintiff will prepare findings of fact, conclusions of law, and judgment in favor of plaintiff and against defendant in conformity with this decision.

[Title of District Court and Cause.]

MINUTE ENTRY OF MARCH 14, 1957

Honorable James A. Walsh, United States District Judge, presiding.

It Is Ordered that the Plaintiff's Proposed Findings of Fact and Conclusions of Law be and they are approved and adopted as the Findings of Fact and Conclusions of Law herein, and

It Is Ordered that the Clerk enter judgment forthwith in favor of the plaintiff and against the defendant for the sum of \$14,813.19 with interest at the rate of 6% upon each overpayment from the date thereof.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for trial before the Court without a jury on February 1, 1957, the plaintiff appearing by Robert O. Royston, Assistant United States Attorney, and the defendant appearing by its attorney Brice I. Bishop, and the Court having considered the pleadings and the evidence herein makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That the above-entitled action was instituted by the plaintiff to recover payments made by the plaintiff to the defendant as a result of the defendant's overcharge for water furnished to the plaintiff;

2. That the Housing Authority of Mohave County was an agency of the County of Mohave authorized to operate housing projects under lease for the federal government pursuant to Appx. 5(B) of the 1952 Cumulative Supplement to the Arizona Code, 1939;

3. That the defendant is a corporation doing business as a public utility at Kingman, Arizona;

4. That by a lease dated July 17, 1944, but effective as of July 1st, 1944, the United States of America leased to the Housing Authority of Mo-

have County a housing project known as Vista Solana Homes, consisting of 31 buildings and containing 120 dwelling units, the said lease providing, among other things, that the United States of America would be responsible for the negotiation and execution of contracts for water;

5. That the plaintiff entered into a contract with the defendant for the supplying of water to the said Vista Solana project;

6. That the tariff rate of defendant, which was on file with the Corporation Commission, was Tariff No. 1 dated August 12, 1919, a copy of which is Plaintiff's Exhibit 1 herein;

7. That from May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana housing project through four meters owned and installed by the plaintiff; and the quantities of water so delivered were reported and billed for each monthly period solely on the basis of the amounts appearing on said meters; but defendant made its charges as though there were a separate meter at each of the 120 housing units;

8. That as a result of this billing practice, defendant overcharged the plaintiff a total of \$15,824.33 during the period from May 20, 1944, to July, 1951; the plaintiff paid all said billings except those for June and July, 1951, which total \$1,011.14.

Conclusions of Law

1. That this Court has jurisdiction of this cause by virtue of the provisions of 28 U.S.C. 1345;

2. The fact that a governmental agency was the customer of the defendant does not render the Arizona regulatory statutes inapplicable to the dealings between defendant and its customer;

3. Any agreement between plaintiff and defendant for water services at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void;

4. Any ambiguity in the filed rate, plaintiff's Exhibit No. 1, must be resolved against defendant, since such rate was prepared by the defendant and submitted by the defendant to the Corporation Commission for approval; so construed, the rate does not permit the charge of a monthly \$2.50 minimum per residence unit;

5. Plaintiff is not estopped to recover the amounts charged and collected by defendant in excess of the lawful rate;

6. Plaintiff was overcharged in the sum of \$15,-824.33, which, after deducting the unpaid portion, leaves a balance overpaid by the plaintiff in the sum of \$14,813.19;

7. Plaintiff is entitled to judgment against the defendant in the sum of \$14,813.19 with interest at the rate of 6% upon each overpayment from the date thereof.

Dated this 14th day of March, 1957.

/s/ JAMES A. WALSH,

United States District Judge.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

CIVIL DOCKET ENTRIES

1957

Mar. 19—Enter judgment in favor of the Plaintiff United States of America and against Defendant Kingman Water Company, Kingman, Arizona, for the sum of \$14,813.19 with interest at the rate of 6% on each overpayment from the date thereof. (Note: Amended by order of May 14, 1957, to provide sum adjudged plaintiff shall bear int. at rate of 6% per annum from Oct. 21, 1952, until paid.)

* * *

May 14—Enter Order that Findings of Fact and Conclusions of Law be amended as to Finding of Fact Number 7 and Conclusion of Law Number 7; enter order that Judgment be amended to provide sum adjudged plaintiff, to wit: \$14,813.19, shall bear int. at rate of 6% per annum from October 21, 1952, until paid; enter order denying Deft's Motion to Dismiss, Motion for a New Trial and Motion to Amend and Supplement Findings of Fact and Conclusions of Law.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant moves the Court for an order dismissing the action and vacating the judgment entered herein because the complaint of plaintiff on file herein fails to state a claim against defendant upon which relief can be granted, upon the grounds and for the reason set forth in defendant's memorandum annexed hereto.

Dated this 25th day of March, 1957.

/s/ BRICE I. BISHOP,
Attorney for Defendant.

Memorandum Supporting Defendant's
Motion to Dismiss

1. Motion to dismiss for failure to state a claim may be made at any time; therefore, the defense of failure to state a claim need not be pleaded in the answer.

2 Moore's Fed. Practice, Sec. 12.07, P. 2241.

McLaughlin vs. Curtis Publishing Co.

(SD NY 1943), 7 FR Serv. 12h.22, Case I.

2. It is a universally recognized rule of law that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal

or that there was no liability to pay in the first instance.

U. S. vs. Edmonston,

181 U.S. 500, 45 L. Ed. 971, 21 S. Ct. 718;

U. S. vs. Wilson,

168 U. S. 273, 42 L. Ed. 464, 18 S. Ct. 85;

Thorn Wire Hedge Co. vs. Washburn and

M. Mfg. Co., 159 U. S. 423, 40 L. Ed. 205,

16 S. Ct. 94;

Little vs. Bowers,

134 U. S. 547, 33 L. Ed. 1016, 10 S. Ct. 620.

3. The only grounds upon which a suit to recover back monies voluntarily paid are: Duress, fraud, mutual mistake, or failure of consideration.

Lamborn vs. Dickinson County,

97 U. S. 181, 24 L. Ed. 926.

4. Where a person pays a demand, having full knowledge of all of the facts which he later asserts render the demand illegal, or otherwise not payable, without any immediate and urgent necessity for making said payment, the payment thereof is voluntary; that is to say, it is voluntary unless compulsory, i.e., made to emancipate the payor from an actual and existing duress.

U. S. vs. New York & C. Mail S. S. Co.,

200 U. S. 488, 50 L. Ed. 569, 26 S. Ct. 327;

Little vs. Bowers, *supra*;

Union P. R. Co. vs. Dodge County,
98 U. S. 541, 25 L. Ed. 196;

Dennehy & Co. vs. McNulta
(CCA 7), 86 F. 825, cert. den. 176 U. S.
683, 44 L. Ed. 638, 20 S. Ct. 1026.

5. The above propositions of law find full application in the case of a public utility.

Swift & Co. vs. Columbia R. Gas & Elec. Co.
(CCA 4), 17 F. 2d 46;

Illinois Glass Co. vs. Chicago Telegraph Co.,
234 Ill. 535, 85 N.E. 200. (See 63 A.L.R.
1349 and cases in note 18, p. 851, 40 Am.
Jur.)

6. Mistake of Law—The trend of modern authority is strongly in favor of the rule that money voluntarily paid under a claim of right, with full knowledge of all of the facts, in absence of fraud, duress, or compulsion, cannot be recovered back merely because the party making payment was, at the time of payment, ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes, of itself, no relief.

U. S. vs. Edmonston, *supra*;

U. S. vs. Wilson, *supra*;

Badeau vs. U. S.,
130 U. S. 439, 32 L. Ed. 997, 9 S. Ct. 579;

Waples vs. U. S.,
110 U. S. 630, 28 L. Ed. 272, 4 S. Ct. 225;

Lamborn vs. Dickinson County,
97 U. S. 181, 24 L. Ed. 926.

7. A mistake of law occurs when a person, natural or artificial, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken inference arising from an imperfect or incorrect exercise of the judgment on facts as they really are. The rule applies fully to contracts of all kinds, and, specifically, contracts with a public utility.

Scott vs. Ford,
45 Ore. 531, 78 P. 742, 80 P. 899;

Illinois Glass Co. vs. Chicago Telegraph Co.,
supra.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant moves the Court to set aside the findings of fact and conclusions of law and the judgment entered herein on the 19th day of March, 1957, and to grant the defendant a new trial on the grounds that:

1. The Court erred in ruling that the fact that a governmental agency was the customer of the defendant did not render the Arizona regulatory statutes inapplicable to the dealings between the defendant and the plaintiff and that the agreement

between the plaintiff and defendant for water services at a rate different from that filed by the defendant with the Arizona Corporation Commission are void;

2. That the judgment is contrary to law in that an agreement between a governmental agency and a public service corporation is binding between the parties irrespective of rates filed with the Arizona Corporation Commission by the utility, and upon the further ground that the complaint on file fails to state a claim upon which relief can be granted.

Dated this 25th day of March, 1957.

/s/ BRICE I. BISHOP,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

SUPPLEMENT TO MOTION FOR NEW TRIAL

Defendant herewith supplements the grounds assigned in its motion for new trial, heretofore filed with the Court, and herewith assigns, as grounds for a new trial in addition to the grounds heretofore assigned, the following grounds:

3. That the judgment is contrary to and not supported by the evidence, and is contrary to law, in

that the agreement in issue in this action was an agreement between a customer and a public service corporation acting in its private capacity, as to which, said agreement is binding upon the parties under the rules applicable to private contracts in general and is free from all regulatory statutes applicable to a public service corporation dealing as a public utility.

4. That the judgment violates the 14th Amendment to the Constitution of the United States, Sec. 1, in that said judgment deprives defendant of its property without due process of law, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

5. That the judgment violates the 14th Amendment to the Constitution of the United States, Sec. 1, in that said judgment denies defendant equal protection of the laws, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

6. That the judgment violates the 5th Amendment to the Constitution of the United States, in that said judgment deprives defendant of its property without due process of law, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

7. That the judgment violates the 5th Amendment to the Constitution of the United States, in that said judgment constitutes a taking of the private property of this defendant without just compensation, in that said judgment compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public service corporations acting as such.

8. That the judgment violates Article 1, Sec. 10, of the Constitution of the United States in that said judgment impairs the obligation of a valid and binding contract between private parties and subjects this defendant, dealing in a private capacity, to the rules applicable to a public service corporation.

9. That the judgment is contrary to law in that the only grounds upon which money voluntarily paid may be recovered are fraud, duress, mutual mistake of fact or failure of consideration, and in that neither fraud nor mistake were affirmatively pleaded, as required by the Rules of Civil Procedure, nor were the same proved, and in that duress and failure of consideration were not proved but, on the contrary, are negatived by the averments of the complaint of plaintiff on file herein and by the evidence.

Dated this 28th day of March, 1957.

/s/ BRICE I. BISHOP,

Attorney for Defendant.

Memorandum of Authorities

14th Amendment to the Constitution of the United States, Sec. 1.

5th Amendment to the Constitution of the United States, Sec. 1.

Art. 1, Sec. 10, Constitution of the United States.

City of Phoenix vs. Kasun,
54 Ariz. 470, 97 P. 2d 210, 212.

Lamborn vs. Dickinson County,
97 U. S. 181, 24 L. Ed. 926.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 1, 1957.

[Title of District Court and Cause.]

MOTION TO AMEND AND SUPPLEMENT
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant moves the Court to amend and supplement its findings of fact and conclusions of law, heretofore filed, in the following particulars:

1. Amend finding of fact No. 5 to read as follows:

That the plaintiff entered into a contract with the defendant, Kingman Water Company, for the supplying of water to the said Vista Solana Housing Project, on or about the 1st day of May, 1944, by

which contract, the defendant agreed to deliver water to said Vista Solana Housing Project at the rate of \$2.50 per month per 3,000 gallons for each of the 120 units contained in the Vista Solana Housing Project.

2. Amend finding of fact No. 7 to read as follows:

That from May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana Housing Project through four meters owned and installed by the plaintiff; that the quantities of water so delivered were reported and billed for each monthly period in accordance with the oral contract as set forth in finding of fact No. 5 of these findings.

3. To strike and eliminate findings of fact No. 8 in its entirety.

4. Make the following additional findings of fact:

(a) That each of the individual 120 family units in the Vista Solana Project was not metered with the customary water service meter because of war-time shortages;

(b) That the plaintiff heretofore filed a complaint to recover overcharges with the Arizona Corporation Commission, which proceeding is captioned as follows: "In the Matter of the Complaint of the Public Housing Administration, an agency of the United States of America, against Kingman Water

Company regarding water rates for the Vista Solana Housing Project, No. Arizona-2331, at Kingman, Arizona, Docket No. 10163-E-1129''; that in said proceeding, said Arizona Corporation Commission adjudged and decreed that the contract between the plaintiff and defendant was not a matter of regulation under the provisions of Arizona statutes and within the jurisdiction of the Arizona Corporation Commission.

5. Consistent with the findings of fact as so amended and supplemented, the conclusions of law should be amended to state that the fact that the oral contract was between a governmental agency and the defendant renders the Arizona regulatory statutes inapplicable to the dealings between defendant and its customer and that where public service corporations and governmental agencies enter into contracts, the rates so agreed upon govern and the question of whether said rates are confiscatory or excessive is immaterial and where such parties make a contract, fixing the amounts to be paid for utility services, the utility may not be required to serve for less and that the defendant is entitled to a judgment against the plaintiff, dismissing the complaint of the plaintiff and for the defendant's costs incurred herein.

Dated this 25th day of March, 1957.

/s/ BRICE I. BISHOP,

Attorney for Defendant.

Memorandum in Support of Motions

Where a governmental agency makes a contract with a public utility, fixing the amount paid for its service, the utility may not be required to serve for less even if its specified rates are unreasonably high. Likewise, it is well established that courts may not relieve a public utility bound by valid contract to render service for fixed amounts from its obligation to serve at agreed rates, however inadequate they have become or may prove to be.

73 C. J. S., Public Utilities, Sec. 25 (c), P. 1048.

43 Am. Jur., Public Utilities and Services, Sec. 87, P. 630, Sec. 188, P. 697.

City of New York vs. Interborough Rapid Transit Co., 297 N. Y. Supp. 243, affirmed 257 N. Y. 20, 177 N.E. 295.

A municipality generally may, in the absence of any direct action by the state, enter into a contract with a public utility whereby the rates to be charged by the latter are fixed and such contract, as between the parties themselves, is binding.

Salt Lake City vs. Utah Light and Traction Co., 52 Utah 210, 173 P. 556.

3 A.L.R. 738.

9 A.L.R. 1165.

28 A.L.R. 587.

With respect to the provision for interest in the judgment, in view of the nature of the case, interest

should not be allowed to run prior to the date of judgment. In this case, there was a bona fide existence of the dispute over the entire claim of the government and the defendant has in good faith denied liability from the entire claim, rendering it unliquidated, and interest should not be assessed until the sum due plaintiff is liquidated by judgment.

Baker County vs. Huntington,
48 Ore. 593, 89 P. 144.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

SUPPLEMENT TO MOTION TO AMEND
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant herewith supplements the above-entitled motion, heretofore filed with the Court, and herewith moves the Court to amend its findings of fact and conclusions of law upon the following additional grounds and in the following additional particulars:

6. Amend finding of fact No. 3 to read as follows:

That the defendant is a corporation doing business as a public utility at Kingman, Arizona; that, however, in the making and performance of the contract herein in issue, said defendant was not

dealing as a public utility as such but was dealing in a private capacity under private contract to perform what it was not under a duty to perform without said contract.

7. To make the additional following finding of fact:

That the payments made by plaintiff to defendant were made voluntarily by plaintiff, under claim of right by the defendant, and with full knowledge in plaintiff of all of the facts which it now asserts rendered the demand unlawful, and without fraud, duress, mistake or failure of consideration, and under mistake of law as to its liability under said contract.

8. Consistent with the findings of fact as so amended and supplemented, the conclusions of law should be amended to state that defendant was not under a duty to serve upon the terms and conditions under which it had been requested to serve and subsequently agreed to serve and did serve, and that the basis of the right to regulation is the said duty to serve, and that where the duty to serve arises from a contract (and not said duty to serve which is implied even without said contract), said contract is not subject to the regulations of the State of Arizona bearing upon public service corporations but is governed solely by the rules applicable to private contracts in general; that, therefore, the statutes of the State of Arizona bearing upon public service corporations are inapplicable herein and the

contract in issue herein is governed solely by the rules applicable to private contracts in general; that said contract is valid and binding and has been fully performed by both parties.

Said conclusions of law should be further amended to state the fact that, in any event, plaintiff's action was one to recover money paid under a mistake of law and that said money was paid voluntarily under claim of right in full knowledge of all of the facts, and without fraud, duress, mutual mistake of fact or failure of consideration and that by reason thereof, the complaint of plaintiff on file herein fails to state a claim upon which relief can be granted, and the evidence adduced upon trial of the cause failed to prove a claim upon which relief can be granted, but that, on the contrary, the complaint and the evidence affirmatively demonstrate that plaintiff is entitled to no relief.

In accordance with the foregoing findings and conclusions, as amended, the Court should then make its conclusion that defendant is entitled to judgment, that plaintiff's complaint be dismissed, and that defendant have judgment for his costs incurred herein.

/s/ BRICE I. BISHOP,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 1, 1957.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, APRIL 8, 1957

Honorable James A. Walsh, United States District Judge, Presiding.

Robert O. Royston, Esquire, Assistant United States Attorney, is present for the Government. Brice I. Bishop, Esquire, is present for the defendant.

Defendant's Motion to Dismiss, Defendant's Motion to Amend and Supplement Findings of Fact and Conclusions of Law, Defendant's Motion for a New Trial; Supplement to Defendant's Motion for a New Trial and Supplement to Defendant's Motion to Amend Findings of Fact and Conclusions of Law come on for hearing this day. Said motions are duly argued by respective counsel, and

It Is Ordered that said motions are submitted and taken under advisement, and

It Is Ordered that the defendant is allowed ten days within which to file a memorandum in support of said motions; counsel for the plaintiff is allowed ten days within which to file an answering memorandum and the defendant is allowed five days thereafter within which to file a reply.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY, MAY 14, 1957

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that the Findings of Fact and Conclusions of Law made and filed herein on March 14, 1957, are amended as follows:

Findings of Fact Number 7 is amended to read: "7. That from May 20, 1944, to July, 1951, the defendant, in its capacity as a public utility, delivered water to the said Vista Solana housing project through four meters owned and installed by the plaintiff; and the quantities of water so delivered were reported and billed for each monthly period solely on the basis of the amounts appearing on said meters; but defendant made its charges as though they were a separate meter at each of the 120 housing units;"

Conclusion of Law Number 7 is amended to read: "7. Plaintiff is entitled to judgment against the defendant in the sum of \$14,813.19, with interest at the rate of 6% from October 21, 1952, until paid."

It is ordered further that the judgment heretofore entered herein is amended to provide that the sum adjudged to plaintiff, to wit, \$14,813.19, shall bear interest at the rate of 6% per annum from October 21, 1952, until paid.

It is ordered further that defendant's Motion to Dismiss, Motion for a New Trial, and Motion to Amend and Supplement Findings of Fact and Conclusions of Law are, and each of them is, denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Kingman Water Company, Kingman, Arizona, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 19th day of March, 1957, and from said final judgment as amended by order entered on the 14th day of May, 1957.

Dated: July 12, 1957.

BRICE I. BISHOP, and
DONALD R. KUNZ,

By /s/ BRICE I. BISHOP,
Attorneys for Appellant.

[Endorsed]: Filed July 12, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Appellant, Kingman Water Company, Kingman, Arizona, deposits herewith with the Clerk of the District Court for the District of Arizona, the sum of Two Hundred Fifty Dollars (\$250.00) in cash as and for its bond for costs on appeal in the appeal

in the above-entitled and numbered matter from the above-entitled Court to the United States Court of Appeals for the Ninth Circuit.

Dated: July 12th, 1957.

BRICE I. BISHOP, and
DONALD R. KUNZ,

By /s/ BRICE I. BISHOP,
Attorneys for Appellant.

[Endorsed]: Filed July 12, 1957.

In the United States District Court
for the District of Arizona

Civil No. 467—Prescott

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KINGMAN WATER COMPANY, Kingman, Arizona,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

ROBERT O. ROYLSTON,
Assistant United States Attorney,
For the Plaintiff.

BRICE I. BISHOP,
For the Defendant.

The Above-Entitled Matter came up for trial on the 1st day of February, 1957, at the hour of 10:00 o'clock a.m. at Prescott, Arizona, before the Honorable James A. Walsh, Judge, and the following proceedings were had, to wit:

The Clerk: United States of America, Plaintiff, versus Kingman Water Company, Kingman, Arizona, Defendant, No. Civil 467.

Mr. Royston: The Government is ready, your Honor.

Mr. Bishop: Ready for the defendant.

The Court: You may proceed.

Mr. Bishop: Your Honor, prior to proceeding I would like to ask leave to make a trial amendment at this time by interlineation in the Answer. And I would direct the Court and counsel's attention to the Answer, in paragraph two, line 24, beginning with the sentence at the end of line 24 where it says: "Said defendant denies that in its monthly billing it made the further assumption that each and every one of the 120 units was occupied every month by a water user."

I would like to amend that—continuing on, it reads: "And in that regard alleges that the monthly billings were made for each of the housing units occupied at the date of the billing."

I would like to amend by interlineation, by having it read: "Said defendant admits that in its monthly billings it made the further assumption that each and every one of the 120 units was occupied every month by a water user." And then strike out the balance of the sentence that reads: "In that

regard," and so on, on to the end, the word, "billings," on line 29. [2*]

The Court: Any objection to that?

Mr. Royston: No objection, your Honor.

Mr. Bishop: There is one other matter, if your Honor pleases, on line 30 there is a dictatorial or typographical error in that the line reads: "Alleges at the time of the consumption of the lease agreement made between it and the plaintiff." The word "lease" should be stricken. I would ask leave to have that portion amended by striking the word "lease."

Mr. Royston: No objection.

The Court: The record may show at this time the Court is manually amending the answer by interlineation in accordance with the motion of the defendant and on stipulation of counsel.

All right, Mr. Royston.

Mr. Royston: If it please the Court, it might save some time if I make a brief opening statement.

The Court: Very well.

Mr. Royston: In this action we are actually agreed on most of the facts involved, but I want to briefly cover the background to show just what the positions are of the respective parties here.

When this housing area was first under contemplation before it was actually constructed, the Public Housing Administration intended to enter into an agreement with the Kingman Water Company, a written agreement for supplying of water

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to the [3] housing project. And at that time back in late '43 negotiations were begun between the Public Housing Administration and the Kingman Water Company. A contract was drawn up by the Public Housing Administration and sent to the Kingman Water Company, but for reasons which we don't exactly know right now, that contract was never signed. We intend to offer that contract into evidence, but it was never signed, so actually that written agreement was never consummated. At that time there were certain water rates which were registered with the Corporation Commission on file there, and it is the Government's contention in this action that since this written agreement was never entered into that the water rates which must be applied to the quantities of water used there at the Housing Administration must be in accordance with that rate that was on file with the Corporation Commission.

Now, the defendant—and I don't want to assume anything which they are not contending—but it is my understanding the defendant takes the position that when this written contract was not entered into that there was some discussion at that time between the officials of the Kingman Water Company and the Public Housing officials at Kingman, relative to these rate charges; and it was agreed or at least was the understanding between the men at that time that the water bills would be computed on the basis of the number of units as if water was being furnished to each individual unit at the [4] Housing Authority. There were 120 units there. So Kingman

Water Company, in preparing its monthly bills, billed it as if each unit was being supplied with water separately. The units were not metered separately and the defendant's contention is the reason the units were not metered separately is because of the unavailability of meters at that time, and the Government officials agreed at a date when they might become available to install separate meters. It is the contention of the Government in that respect that the water was actually furnished through four main meters and distributed to each individual unit, and there was no meter between this main meter and the units themselves. So we don't know exactly how much water each unit used, but we do know the amount that went through the main. It is the Government's contention that the billings should be made as if they were receiving water at this one location and it should be computed on the basis as if there was a single unit rather than 120 separate units. I don't know if I make that clear.

The Court: I understand you. I get your picture, if that is an accurate contention of the defense.

Mr. Royston: If I am in error on this I am sure Mr. Bishop will correct it. I believe as far as the figures are concerned that there is no disagreement between us in regard to the computations. In other words, if the contention of the Government in the way the bill should have been prepared [5] is right, then the figure we allege in our complaint is the correct figure that the Government overpaid. If the way the defendant computed the monthly billings is right, then the defendant has been paid the

amount they were entitled to, with the exception of the last two months. As set out in the complaint, there were two months they weren't paid for, which amounted to a little over a thousand dollars. In other words, we are not in dispute on the figures, we are in dispute on the method of computation which has been used in arriving at the figures. I intend to put on one witness to give a little bit of the background.

The Court: Do you have this Tariff No. 1 that you refer to in your complaint? You didn't attach it.

Mr. Royston: Didn't I attach it? I thought it was attached to that. I am sure I have some copies of it. Maybe I should have this marked as an exhibit.

The Court: Is there any objection to it, Mr. Bishop?

Mr. Bishop: I have no objection.

The Court: It will be received as Plaintiff's No. 1 in evidence.

(Plaintiff's Exhibit No. 1 marked in evidence.)

PLAINTIFF'S EXHIBIT No. 1

State of Arizona

Arizona Corporation Commission

To All to Whom these Presents shall Come, Greeting:

I, Mel D. Michael, Secretary of the Arizona Corporation Commission, Do Hereby Certify That this is a true and correct copy of the schedule of water rates of Kingman Water Company as of date August 12, 1919, as said rate schedule appears in the records of the Commission.

In Witness Whereof, I Have Hereunto Set My Hand and Affixed the Official Seal of the Arizona Corporation Commission, at the Capitol, in the City of Phoenix, This 27th day of May, 1949 A.D.

[Seal] By /s/ MEL D. MICHAEL,
Secretary.

Water Rates of

Name: Kingman Water Company.

Address: Kingman, Arizona.

Filed by: I. M. George.

Date: August 12, 1919.

(For details of this classification see text of accounting order, Page 5.)

1.-b. Commercial—Meter Rates:

All Connections Metered. We Require \$5.00 Deposit

\$2.50 Minimum Rate of 3,000 Gallons

3,001 to 50,000 gals.	\$.50 per Thousand
50,000 to 75,000 gals.45 per Thousand
75,000 to 100,000 gals.40 per Thousand
100,000 to 250,000 gals.35 per Thousand
250,000 to Up gals.30 per Thousand

(Fill in nothing below this line.)

File No. 105.

Authority:

Date Effective:

Cancelled:

Supplement to:

Classification:

Transferred to:

Cancelling:

Tariff No. 1.

Admitted in evidence February 1, 1957.

PAUL M. SAPP

called as a witness herein, having been first duly sworn, testified as follows: [6]

Direct Examination

By Mr. Roylston:

Q. Your name is Paul M. Sapp, and what is your employment, Mr. Sapp?

A. I am the utilities officer in the San Fran-

(Testimony of Paul M. Sapp.)

cisco Regional Office of the Public Housing Administration.

Q. How long have you been in the San Francisco Regional Office, Mr. Sapp?

A. Approximately eleven years.

Q. Have you had occasion to work on this matter between the Public Housing Administration and the charges of the Kingman Water Company, between June of 1944 up to and including July of 1951?

A. I have.

Q. Do you have the files of the Public Housing Administration in connection with this matter with you?

A. Yes; I do.

Q. Will you look in the files and see if you can find a copy of the first contract which was offered to the Kingman Water Company?

A. Yes; I have that in my records.

Mr. Royston: Could this be marked for identification, please?

(Plaintiff's Exhibit 2 marked for identification.)

Q. (By Mr. Royston): Referring to this Plaintiff's [7] Exhibit 2 for identification, this is a copy of an agreement which was sent to the Kingman Water Company, is that correct?

A. That is correct.

Q. This comes from the Public Housing Administration files which are kept in connection with this matter, is that right?

A. That is right.

(Testimony of Paul M. Sapp.)

Mr. Royston: I will offer 2 for identification into evidence.

Mr. Bishop: May I ask a question on voir dire?

The Court: Surely.

Q. (By Mr. Bishop): Mr. Sapp, with respect to this contract, do your records show at what time it was mailed to the Kingman Water Company?

A. Yes, sir.

Q. Can you tell us that day?

A. It was mailed by letter of transmittal dated April 20, 1944.

Mr. Bishop: If your Honor please, I don't want to get technical, because I don't think it is necessary in this kind of a matter, but I would like to state that I fail to see the materiality of this agreement. The record, I think, and the admission of the pleadings, shows that service was instituted in June or at least the first of July, 1944, and we are now referring to an agreement that was never executed by either of the parties that was transmitted in August of '44. [8]

The Court: You said April, did you?

Mr. Bishop: April 20th? I thought you said 8/20.

The Court: No; he said April 20th.

Mr. Bishop: I still don't think the agreement or this unexecuted agreement would have any material bearing on the issues in this case.

The Court: I, myself, don't see where it would be of any assistance. It wasn't entered into.

(Testimony of Paul M. Sapp.)

Mr. Roylston: It isn't of too much value. I thought it would be background.

The Court: The objection will be sustained.

Q. (By Mr. Roylston): Now, from the file of the Public Housing Administration no written contract was entered into during this period in question, is that correct, Mr. Sapp?

A. The first written contract was entered into as of July 21st, 1951.

Q. July 21st of '51 was the first written contract? A. That is correct.

Q. Do you have a copy of that contract with you? A. I do.

Mr. Roylston: May this be marked for identification?

(Plaintiff's Exhibit 3 marked for identification.)

Mr. Bishop: I have no objection to that being admitted.

The Court: All right, it may be received as 3 in evidence. [9]

(Plaintiff's Exhibit 3 marked in evidence.)

(Testimony of Paul M. Sapp.)

PLAINTIFF'S EXHIBIT No. 3

Housing and Home Finance Agency
Public Housing Administration
National Housing Agency
Federal Public Housing Authority

San Francisco Field Office
1360 Mission Street
San Francisco 3, California

July 21, 1951.

Water Contract No. (Ariz.-2331-SF)m-1,
Project No. Ariz-2331.

Kingman Water Company,
Kingman, Arizona.

Gentlemen:

The United States of America, Public Housing Administration (PHA) or any successor to its powers, functions, and duties, by the undersigned, offers to take and pay for water furnished by Kingman Water Company (Utility) to meet the requirements of occupants of Vista Solana Housing Project (No. Ariz-2331) consisting of approximately 120 dwelling units (Project), located in the City of Kingman, State of Arizona, subject to the following terms and conditions:

1. Delivery of water under the terms hereof shall commence on July 21, 1951, and shall continue until the Utility is notified by the Public Housing

(Testimony of Paul M. Sapp.)

(Plaintiff's Exhibit No. 3—(Continued):

Administration to discontinue delivery. The rate specified herein shall apply as to all bills rendered after the date hereof.

2. Delivery of water shall be made through metering equipment furnished, installed, and owned by the PHA but operated and maintained by the Utility located at four points on the Project. Meters shall be designated as Nos. 2, 3, 4 and 5. The points of delivery shall be at the outgoing side of such metering equipment.

3. Except as otherwise indicated, the water service to be furnished and payment therefor shall be in accordance with the following Schedule of water rates. The Utility represents that the rates contained in the following Schedule are the lowest applicable rates for service taken by the Project:

Minimum Charges—Rate Schedule (Per Month)

\$10.00 for each 1½ inch meter, total.....	\$30.00
\$12.50 for each 6-2 inch meter, total.....	12.50
	<hr/>
	\$42.50

Minimum charge includes 51,000 gallons of water

Next	47,000 gallons at \$.50 per 1,000 gallons
Next	25,000 gallons at .45 per 1,000 gallons
Next	25,000 gallons at .40 per 1,000 gallons
Next	150,000 gallons at .35 per 1,000 gallons
All over	298,000 gallons at .30 per 1,000 gallons

4. Payments pursuant to the above Schedule shall be made on the basis of totalized monthly meter readings and in accordance with bills sub-

(Testimony of Paul M. Sapp.)

(Plaintiff's Exhibit No. 3—(Continued):

mitted by the Utility to the Housing Authority of Mohave County on or about the 20th day of each month.

No portion of the water furnished hereunder shall be resold except that the PHA may distribute water to the occupants of the Project as an incident of tenancy.

In compliance with Acts of Congress and Executive Orders of the President it is understood: (a) No Member of or Delegate to Congress shall be admitted to any share or part of this contract or to any benefit to arise thereupon, provided this provision shall not extend or be construed to extend to any contract accepted by any incorporated company where it is made for the general benefit of such corporation; (b) there shall be no discrimination by reason of race, creed, color, or national origin against any employee or applicant for employment qualified by training and experience for work in connection with this contract. The Utility shall include the latter provision in all subcontracts for any part of the work under this contract.

If you accept this offer subject to the foregoing terms and conditions, please indicate your acceptance by the signature of an authorized officer of the Utility in the space provided below on the original and two copies, return to the undersigned the original and one copy of this letter and retain the third

(Testimony of Paul M. Sapp.)

(Plaintiff's Exhibit No. 3—(Continued):
copy which is to be considered as an original upon
dispatch of the foregoing.

All rates, schedules, rules, and regulations contained herein shall be subject to approval of the Arizona Corporation Commission.

THE UNITED STATES OF AMERICA PUBLIC HOUSING ADMINISTRATION,

By /s/ E. STANTON FOSTER,
Acting Director, San
Francisco Field Office.

Accepted:

KINGMAN WATER
COMPANY,

By /s/ J. M. GEORGE,
Pres.

This is to certify that I am the Secretary of the Utility to which the above offer is addressed; that I, who accepted this offer and made this contract on behalf of said Utility, was then Sect. of said Utility; that such acceptance was duly signed for and in behalf of said Utility pursuant to authority of its governing body and is within the scope of its corporate powers.

[Seal] /s/ DONALD GEORGE,
Secretary.

Admitted in evidence February 1, 1957.

(Testimony of Paul M. Sapp.)

Q. (By Mr. Royston): Now, Mr. Sapp, based on the Public Housing Authority's interpretation of the application of the rate schedule filed by Kingman Water Company with the Corporation Commission, have you computed the monthly charges as the Public Housing Administration interprets the application of the rate schedule?

A. Yes; I have.

Q. Do you have that with you?

A. Yes; I have that calculation.

Mr. Royston: May that be marked?

(Plaintiff's Exhibit 4 marked for identification.)

Mr. Royston: I will offer this Plaintiff's Exhibit 4. I might state to the Court that these figures are admitted, but I thought the Court in arriving at some decision that this would show more clearly what the Public Housing Authority contends is the proper application of the rate schedule.

Mr. Bishop: No objection.

The Court: It will be received as Plaintiff's 4 in evidence.

(Plaintiff's Exhibit 4 marked in evidence.)

Q. (By Mr. Royston): Mr. Sapp, did you on any occasion, say, prior to June of 1944, were you ever engaged in any discussions with officials of the Kingman Water Company, you, yourself. [10]

A. I was not an employee of the Public Housing Administration at that time.

Mr. Royston: No further questions.

(Testimony of Paul M. Sapp.)

Cross-Examination

By Mr. Bishop:

Q. Mr. Sapp, do you have any records or letters, I mean copies of correspondence in your file that would relate to the negotiations regarding water service for the Vista Solona Project at Kingman, Arizona, other than the letter of transmittal relating to the unsigned contract that you have referred to?

A. I have some correspondence that relates to it. That is a very broad question. I do have.

Q. The correspondence I would refer to, if there is any correspondence in your file other than the letter of transmittal you have referred to, that would relate to the matter of the charges to be applied to the Vista Solona Project when water service was instituted; and I refer to the period from, say, as I understand it, the service started in June of 1944 or July.

A. Actually, I think, in May, Mr. Bishop.

Q. I was wondering if you had any correspondence relating to charges?

A. I have some that relate to charges. [11]

Q. May I examine them, please?

A. They do not specify the charges, nor do they actually refer to the rates themselves. However, they are simply correspondence between the Public Housing Administration and the Housing Authority of the County of Mohave, and between the Water

(Testimony of Paul M. Sapp.)

Company and the Public Housing Administration, requesting information and similar——

Q. Is there any correspondence that referred to water meters?

A. None of this correspondence refers to water meters, with the one exception, that there was a letter dated October 16, 1943, from the engineers who were designing the project to the Public Housing Administration, at that time the Federal Public Housing Authority, setting forth the conditions under which the engineers planned to serve the project. There is that letter on file.

Mr. Bishop: I would like to offer this letter in evidence or have it read in evidence.

Mr. Royston: I have no objection, your Honor.

Mr. Bishop: I think, if your Honor please, it would probably save a lot of confusion if I read this letter into the record, if counsel will agree. In other words, we won't suffer Mr. Sapp's file with documents missing.

The Court: All right.

Mr. Royston: I have no objection. [12]

Mr. Bishop: May I have your file just a minute, sir?

At this time, if your Honor please, I would like to read into the record a letter from the witness' file, which file is captioned: "Arizona-2331, Kingman, Utilities." And the letter is headed, "Johannessen & Girand, 606 Ellis Building, Phoenix, Arizona, October 16, 1943." It is directed to: "Federal Public Housing Authority, 785 Market Street, San

(Testimony of Paul M. Sapp.)

Francisco 3, California. Attention Mr. Allen van Rensselaer," and it has immediately under that: "Re Water Distribution System, Kingman, T. D. U. F. P. H. A. Project No. Ariz. 2331.

"Dear Mr. van Rensselaer: In preparing the tentative layout for the above-captioned project we have encountered a problem which we would like to submit to your priority division for a ruling.

"There is an existing six-inch water main which crosses through the middle of the project site. This main will be used as the source of water for the project. It is possible to connect twelve of the buildings directly to this main without laying any additional parallel main. To do this we will require the installation of three one and one-half inch disc water meters.

"The balance of the buildings, including one fire hydrant, will be served from a long main which will be connected to the existing main and metered with a six-inch by three-inch fire service disc [13] meter.

"The above-described layout eliminates the construction of a main paralleling the existing main and makes an over-all saving of about \$800.00. It has the disadvantage that it will require the installation of three extra one and one-half inch meters.

"Our present directive does not prohibit the use of multiple meters, but we have had considerable difficulty with the W.P. in the past, therefore we are passing this matter to you for your instructions. Will you please advise us of your decision by tele-

(Testimony of Paul M. Sapp.)

graph at the earliest possible moment. Very truly yours. Johannessen & Girand, by James Girand.”

And the letter is dated October 16, 1943.

Mr. Sapp, now, will you examine your file and see if there is any more correspondence relating to meters or rates?

A. There is a letter dated April 13, 1944, from the Federal Public Housing Authority to the Housing Authority of Mojave County, the purport of which is that to date the schedule of rates and conditions of service for water at the project had not been received at the San Francisco office.

Q. Is there anything else in your file?

A. The next letter was dated April 20th, 1944, and transmitted to the draft of the proposed water service contract to the Kingman Water Company, from the Federal Public Housing Authority. A letter dated May 8th, 1944, from Mr. Carl G. Crook, attorney for Kingman Water Company, to the [14] Regional Counsel, Federal Public Housing Authority, San Francisco, relating to this draft of the contract which had been submitted and asking for a Government representative to go over the entire situation with him.

Q. And that letter was dated May 8th, 1944?

A. That is correct.

Mr. Bishop: I think if counsel doesn't object I would like to read this letter.

Mr. Royston: I have no objection.

Mr. Bishop: This letter is a letter dated May 8th, 1944; it is headed: Law office of Carl G. Crook.

(Testimony of Paul M. Sapp.)

P. O. Box 1029, Kingman, Arizona, and dated May 8th, 1944. It is addressed to Mr. John L. Fitzgerald, Regional Counsel, Federal Public Housing Authority, 785 Market Street, San Francisco 5, California; and bears the reference: RX: Legal: RC: Ariz.-2331.

“Dear Sir. Your letter of the 20th Ult. in which you enclose draft of proposed water service contract for housing project Ariz.-2331 Kingman, have been gone over carefully by the Company, and I am asked to state to you that the proposed agreement is not satisfactory in view of the many changes in the field.

“As there are quite a number of points that will require discussion and negotiation we believe it advisable for the Government to send a representative so we can go over the [15] entire situation with him.

“Will you kindly advise us as to when the Government representative can be here? Yours truly.” And it is signed: Carl G. Crook, Attorney for Kingman Water Co.

Mr. Sapp, does your file contain any response to that letter of May 8th? A. No; it does not.

Q. Do you know whether or not Government representatives were sent to Kingman in respect to the water service?

A. Of my own knowledge, I do not.

Q. Do you of your own knowledge know when a complaint was first registered with respect to water charges? A. Yes.

(Testimony of Paul M. Sapp.)

Q. Can you tell me?

A. The first written complaint was dated June 12th, 1951, a letter to the Kingman Water Company from the Housing Authority of Mojave County. I cannot say what oral representations have been made prior to that time; I believe there were some.

Q. You don't know though of your own knowledge whether there were any?

A. I did not participate in them personally.

Q. Then I believe a complaint was filed by the Government before the Corporation Commission of the State of Arizona, is that correct?

A. That is correct. [16]

Q. When was that complaint filed?

A. Submitted to the Arizona Corporation Commission by the Public Housing Administration June 9th, 1952.

Mr. Bishop: May this be marked?

The Court: Is there any objection?

Mr. Royston: No objections.

The Court: It will be received as Defendant's A in evidence.

(Defendant's Exhibit A marked in evidence.)

(Testimony of Paul M. Sapp.)

DEFENDANT'S EXHIBIT A

Jan. 7, 1953.

Before the Arizona Corporation Commission

DECISION No. 27023-A

In the Matter of the

COMPLAINT OF PUBLIC HOUSING ADMINISTRATION, AN AGENCY OF THE UNITED STATES OF AMERICA, AGAINST KINGMAN WATER COMPANY REGARDING WATER RATES FOR THE VISTA SOLANA HOUSING PROJECT, No. ARIZ.-2331, AT KINGMAN, ARIZONA

Docket No. 10163-E-1129

ORDER AND DECISION

By the Commission:

This matter having come on for hearing before the Arizona Corporation Commission on the 21st day of October, 1952, at the Courthouse of Mohave County, in the City of Kingman, State of Arizona, and the Plaintiff having presented evidence in support of its complaint, and the Defendant having appeared by I. M. George, its president, and Carl G. Crook, its attorney, and the Defendant having filed its Motion to Dismiss and both parties having filed memorandum briefs in support of their respective

(Testimony of Paul M. Sapp.)

positions, and it appearing that the complaint of the Plaintiff concerns a question of fact as to whether there was a water contract between the Plaintiff and the Defendant; and, if there was such a contract, whether or not the contract violated the rate schedules of the Defendant, and it further appearing that such matters involve the existence and/or construction of a contract between private litigants and that the Corporation Commission has no jurisdiction to hear and determine such matters,

Now, Therefore, It Is the Order and Decision of This Commission that the complaint of the plaintiff be, and it is hereby dismissed.

By Order of

THE ARIZONA CORPORATION
COMMISSION.

In Witness Whereof, I, E. T. ("Eddie") Williams, Jr., Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of this Commission to be affixed, at the Capitol in the City of Phoenix, this 30th day of December, 1952.

/s/ E. T. "EDDIE" WILLIAMS, JR.,
Secretary.

Admitted in evidence February 1, 1957.

(Testimony of Paul M. Sapp.)

Mr. Bishop: If your Honor please, may the record show that Defendant's Exhibit A in evidence purports to be a decision, No. 27023-A in the matter of the complaint of the Public Housing Administration, an agency of the United States of America, against Kingman Water Company, regarding water rates for the Vista Solona Housing Project, No. Ariz.-2331 at Kingman, Arizona, Docket No. 10163-E-1129, dated December 20, 1952.

The Court: May I see it?

Mr. Bishop: I have no further questions.

Redirect Examination

By Mr. Roylston:

Q. Let me ask you just one or two questions. Do you have a blueprint that shows the layout of the project up there at Kingman? [17]

A. Yes.

Mr. Roylston: Could this be marked?

Mr. Bishop: I have no objection to it.

(Plaintiff's Exhibit 5 marked in evidence.)

Q. (By Mr. Roylston): Mr. Sapp, referring to this 5 in evidence, I see in red pencil No. 5, No. 4, No. 3, No. 2 across the middle of this. Will you tell us what those numbers represent?

A. Those numbers represent the identification numbers of the four water meters connected to the six-inch water main running transversely across the project.

Q. Now, with respect to this blueprint, will you

(Testimony of Paul M. Sapp.)

interpret Defendant's Exhibit A, which was the letter from Johannessen and Girand, will you interpret that letter with regard to this blueprint, the letter that was read into the record a few minutes ago?

A. A setting of the meters as they were eventually set on the project was done in such manner as to conserve materials. At that time we were engaged in war and there were certain restrictions on materials and every effort was made to save pipe. The letter from Johannessen and Girand was for the purpose of obtaining approval for the setting of the meters as they were set, which appeared to Johannessen and Girand to be the most economical method of setting those meters and avoid laying additional pipelines across the project. [18]

Q. Now, the meters referred to in that letter from Johannessen and Girand are these particular four meters which are numbered across here, is that correct? A. That is my understanding.

Q. And additional meters referred to in that letter do not apply to individual unit meters, is that correct? A. No, sir; it could not.

Mr. Bishop: I object to that, if your Honor please, on the ground the letter speaks for itself.

The Court: I don't see how it could possibly be construed to mean individually. There are how many houses?

Mr. Royston: 120.

The Court: It speaks of three meters in one

(Testimony of Paul M. Sapp.)

place and four in another. It couldn't possibly mean the individual meters.

Mr. Royston: That is what I want to get to. I have one further question.

Q. (By Mr. Royston): You have been with the Public Housing Administration for about eleven years, you say? A. Since November, 1945.

Q. And your work is along the line of the utilities such as this, is that correct?

A. Yes. I am the utilities officer and engineer.

Q. Will you tell us what the ordinary and regular practice of the Public Housing Administration is with respect to [19] individual meters in projects such as this one at Kingman?

Mr. Bishop: Objection, if your Honor please. The practice of the Housing Commission in connection with other projects would have no material bearing on the question in issue in this lawsuit, which is established by the answer and by the complaint, and that is the terms of an oral agreement for service until July of 1951.

The Court: We are concerned with what happened in this case.

Mr. Royston: Yes, sir. I thought we were concerned with whether there was to be individual metering in this case.

The Court: The practice wouldn't establish it.

Mr. Royston: If it wouldn't have any bearing on it—

The Court: This might be the exception.

Mr. Royston: All right, sir. I have no further questions.

Mr. Bishop: I have no further questions.

Mr. Royston: The Government rests, your Honor.

(Plaintiff rests.)

Mr. Bishop: If your Honor please, with respect to the defense, I think Mr. Royston has accurately stated it as far as he went. I would like to point out that in my answer I have raised also the question or the further defense of estoppel by reason of delay in asserting this claim and by reason of [20] the billings having been made and paid over a long period of time. And I will develop the legal propositions with respect to that defense at the close of our evidence.

The Court: All right.

Mr. Royston: If it please the Court, it might save some time if the evidence is going to go into the question of delay creating estoppel, I probably should have moved to strike that from the answer already. I don't know whether it would be proper at this time to move to strike the allegations concerning estoppel and save that much time with the evidence, but it is the contention of the Government that estoppel cannot be used to apply against the Government.

The Court: You can argue that at the end of the case. I took it that was what counsel was getting at in his examination of Mr. Sapp.

Mr. Bishop: It was. And I understand the rule that Mr. Royston will assert——

The Court: There are several questions along that line, not only the Government, but you have a question if this rate or tariff does control the service in this case, there can't be any estoppel, because a public utility can't give a different rate or use a different rate, and it is a matter of public policy. Estoppel won't enter into it if this rate is controlling. I don't know whether it is or not.

Mr. Roylston: I am probably raising stuff too quick. [21]

Mr. Bishop: At this time is the deposition of Mr. I. M. George in the file?

The Court: Yes.

Mr. Bishop: If your Honor please, at this time I would like to offer the deposition of Ira M. George into evidence, which deposition was taken at Kingman, Arizona, before L. O. Tucker, a notary public in Mojave County, and at Kingman, 501 East Oak Street, on September 13th, 1956, beginning at 2:00 o'clock p.m. And I was wondering how you would prefer this be done. You haven't had the opportunity to hear this and I was wondering if it would be proper and convenient to read the deposition, omitting the formal part, into the record.

The Court: If there is no objection to it, why not let it be admitted and I will read it at the end of the matter?

Mr. Roylston: No objection.

Mr. Bishop: All right.

(Defendant's Exhibit B marked in evidence.)

Mr. Bishop: At this time I would like to call as a witness Mr. Donald George.

DONALD GEORGE

called as a witness herein, having been first duly sworn, testified as follows: [22]

Direct Examination

By Mr. Bishop:

Q. Mr. George, what is your full name for the record? A. Donald George.

Q. Where do you reside?

A. 149 East Pine Street, Kingman, Arizona.

Q. Did you reside at that address and city in 1944? A. Yes; I did.

Q. What is your business or occupation, Mr. George?

A. Office manager of the Kingman Water Company.

Q. Are you also an officer of the Kingman Water Company? A. Yes, sir.

Q. What office do you hold?

A. Secretary-treasurer.

Q. Directing your attention to the year 1944, who was the managing officer of the Kingman Water Company? A. I was.

Q. Who was the president of Kingman Water Company at that time? A. I. M. George.

Q. Was Mr. I. M. George active in the affairs and management of the business of Kingman Water Company at that time? A. No.

Q. I am referring, Mr. George, to 1944.

A. Oh, yes; he was at that time. [23]

Q. Is he at this time?

(Testimony of Donald George.)

A. No; he isn't at this time.

Q. Did you participate or have anything to do with the negotiations with respect to water service to the Vista Solona Housing Project in Kingman in 1944? A. No.

Q. Who conducted those negotiations on behalf of the Kingman Water Company?

A. I. M. George, president.

Q. Do you know who was present in Kingman as representative of the Federal Housing Agency?

A. George Gibson was the man that was usually there to do all the business with Mr. George. I believe he was an engineer.

Q. Do you know whether Mr. Gibson is, where he is now? A. He is deceased.

Q. In the year 1944 I will ask you if water meters were then available for new services?

A. No; they were very scarce.

Q. And why, Mr. George?

A. On account of the war, material, labor.

Q. With respect to the Vista Solona Project, do you know who supplied the water meters that were used on that project? A. The Government.

Q. And what kind of meters did they supply?

A. It was one six by two and three one and a half to two [24] inch, I believe.

Q. What meters does the Kingman Water Company usually use for residential services?

A. Three-quarter inch, five-eighths by three-quarters.

Q. In 1944 did the Kingman Water Company

(Testimony of Donald George.)

have any three-quarter inch meters available or on hand at that time? A. No.

Q. Mr. George, when did you become the directing manager of the Kingman Water Company? Let me rephrase it. When did you take over the duties of Mr. I. M. George?

A. I would say in 1950-51.

Q. When did you first receive any complaints from the Federal Government or the Mojave County Housing Authority relating to water charges to Vista Solona Project?

A. Either around 1952 or '54. I couldn't say the exact date.

Q. Mr. George, with respect to the meters at the Vista Solona Project, was the Kingman Water Company ever advised by the Federal Housing Agency or the Mojave County Housing Authority as to what units in the Vista Solona Project were served from the meters located on the project?

A. No.

The Court: Did I understand, Mr. George, you read the meters but didn't know where the water——

The Witness: No; I believe the question was supposed [25] to be this way: You didn't know whether there were ten houses, twenty houses or thirty houses full or empty, or whether there were ninety per cent of them full.

The Court: But you did know where the meter went——

(Testimony of Donald George.)

The Witness: We did know where the meters were.

The Court: What houses it went to?

The Witness: Not particularly, no. No; we didn't install them.

Q. (By Mr. Bishop): In other words, you knew where the three——

A. We knew the location of them.

Q. But you did not know what lines or what unit lines came off of which meter? A. No.

Q. Directing your attention to the years 1944 up to July of 1951, Mr. George, did the Kingman Water Company bill other residential services in Kingman, Arizona, on the same basis?

A. Yes.

Q. Now, with respect to services to multi-family units other than the Vista Solona Project, did you have any such services during that period?

A. A few small ones.

Q. Can you give me an example of one?

A. Well, let's see. We could take the Windsor Apartments for one. That is four apartments. [26]

Q. How many meters did the Windsor Apartments contain? A. One meter.

Q. How were the apartment units billed?

Mr. Royston: I object to that as immaterial, if it please the Court.

The Court: The objection is sustained.

Mr. Bishop: I believe that is all.

(Testimony of Donald George.)

Cross-Examination

By Mr. Roylston:

Q. As far as you know, Mr. George, was there any attempt to determine the number of units that were occupied each month prior to the billing by the Kingman Water Company?

A. No; the Water Company didn't.

Q. And they were billed on the basis of 120 units as if each were occupied, is that correct?

A. Yes.

Mr. Roylston: No further questions.

Mr. Bishop: That is all.

BENJAMIN F. GOLDING

called as a witness herein, having been first duly sworn, testified as follows: [27]

Direct Examination

By Mr. Bishop:

Q. Mr. Golding, what is your full name for the record? A. Benjamin Franklin Golding.

Q. Where do you reside?

A. Kingman, Arizona.

Q. What is your occupation?

A. I am retired right now.

Q. Directing your attention to the years from, say, 1942 to 1951, did you reside in Kingman?

A. Yes, sir.

Q. At that time what was your business or occupation?

(Testimony of Benjamin F. Golding.)

A. From about April 1st, 1942, until around May, '46, I was executive secretary of the Mojave County Housing Authority.

Q. With respect to the Vista Solona branch or the Vista Solona Project of the Mojave County Housing Authority, when was that opened?

A. During the month of May, 1944, I believe it was.

Q. What were your duties with respect to that project?

A. I was executive secretary or manager of the project.

Q. And did you have supervision of the rental of the units and the maintenance of the property?

A. I did.

Q. Where was your office located?

A. When they first opened, when we first opened the Vista Solona Project my office was out at the Hualapai Homes out at the air base. [28]

Q. The Hualapai Homes was another project that was sponsored by the same Housing Authority? A. That is correct; the same Agency.

Q. How long were you the resident manager and executive secretary of the Vista Solona Project?

A. Approximately two years.

Q. That would be from—

A. Some time in May, 1944, or from the time it was completed, until around, I believe, the middle or May 15th, 1946, was when I resigned.

Q. During the period that you acted in that ca-

(Testimony of Benjamin F. Golding.)

capacity what was the condition of the occupancy of the units at the Vista Solona Project?

A. Well, for the first year or such a matter they were almost completely filled. Of course tenants were coming and going all the time, but we had a very high percentage of occupancy.

Q. How were the units rented, on what basis?

A. There were three types of units, what we call a no-bedroom, one-bedroom and a two-bedroom unit. And rentals varied according to the size of the unit, and it included electricity and water in the total charge for the rental.

Q. How about furniture?

A. And furniture also, all furnished.

Q. Now, were the 120 units maintained by your office in [29] use regardless of occupancy?

A. Oh, yes; we had a maintenance crew.

Q. And with respect to units that were empty, would water be used from those units by your maintenance crews?

A. Yes. We would use the water from the spigot adjoining all of the units on the shrubbery, trees and different types of shrubbery and lawns.

Q. Now, Mr. Golding, during your term of office as resident manager and executive secretary, was there any difficulty with respect to the water charges of the Kingman Water Company? A. None.

Q. And did you ever make any complaint to the Kingman Water Company with respect to its water charges?

A. No. That was entirely out of my field of op-

(Testimony of Benjamin F. Golding.)

eration, because the units, you see the Mojave County Housing Authority were an operating unit and the projects were completed and turned over to us with all utilities and everything and all we did was maintain the units and take care of the rentals.

Q. Did the Government have a field representative that visited the project during your tenure in office? A. Yes.

Q. Who was it?

A. We had a regular representative, was a man by the name of Bill Elder, he is now deceased.

Q. Do you know from which office he was out of? [30] A. Out of the San Francisco office.

Q. How often did he come to the project while you were in charge?

A. Oh, it varied in periods of time. Sometimes every thirty days or sixty days or ninety days. I think it was principally upon his time allotted at the various projects. We also had auditors periodically.

Q. During those visits did Mr. Elder—did you ever have a conversation with Mr. Elder regarding water charges? A. No, sir.

Q. You were not present, I take it, Mr. Golding, during any negotiation with respect to the water service to be made to the Vista Solona Project?

A. No; I was not.

Mr. Bishop: No further questions.

(Testimony of Benjamin F. Golding.)

Cross-Examination

By Mr. Roylston:

Q. You say you weren't present during any negotiations? A. No, sir; I was not.

Q. After the time you took over as the manager, did you have any conversation with either Mr. I. M. George or Mr. Don George, or both, concerning the water charges?

A. There was a period, I believe, it was either 1945—it was quite a long time after we took the project over—that [31] there was something said about services. And up to that time I didn't even know that we weren't receiving water on contract. And Mr. I. M. George had informed me that they hadn't been able to get together with the Federal Housing Authority in San Francisco.

Q. Did you discuss with Mr. George how the water was to be billed? A. No; I did not.

Q. Did you discuss with him whether the water was to be billed on an occupancy basis or unit basis?

A. No; I did not. He told me in an outline the proposition that he had made to the San Francisco office, our San Francisco office, and he said that was the basis under which he was making the billings. But I had no argument with that because it was out of my jurisdiction anyway. I had nothing to do with that.

Q. Did you discuss with Mr. I. M. George and

(Testimony of Benjamin F. Golding.)

Mr. Don George the charges for water would be based on the number of units occupied?

A. No; I don't believe I did. I might have expressed an opinion that would be my idea of the way they should be based, but it didn't coincide with the proposition Mr. I. M. George had made to their engineer in our home office in San Francisco.

Q. Do you recall discussing this matter back on September 26th with Mr. Laird who came to Kingman and talked to you about [32] this matter, September of this past year?

A. I never seen him. He didn't talk to me. Mr. Laird—oh, he is from Prescott, isn't he?

Q. Yes, sir.

A. Yes; I talked to Mr. Laird and he visited my house up there one time. He asked me quite a number of questions and I had to kind of refresh my memory to find out. It had been so far away, long ago that—I told Mr. Laird I believe that I had discussed with either Don George or Mr. I. M. George the matter of meters, or something like that. But I think I also told him that the Housing Authority turned the idea down, I mean the Federal Housing Authority in San Francisco. The local Housing Authority was in favor of installing meters at each unit and passing that charge on to the renter; but San Francisco said nothing doing on that.

Q. Do you recall on September 26th telling Mr. Laird you had had a conversation with Don George

(Testimony of Benjamin F. Golding.)

or I. M. George, or both, and in this conversation it was agreed the charges for water would be based on the number of units occupied?

A. No; I never made any such statement as that. I might have talked to him about my personal opinion of how it should be based, but we had no agreement—I never told Mr. Laird or anybody else we had any agreement, because it wasn't up to me to make an agreement with any utilities firm on charges for services of any type. [33]

Q. As far as you know, you never submitted any lists of the occupied units or anything to the Kingman Water Company?

A. No.

Mr. Royston: No further questions.

Mr. Bishop: I have no further questions.

(Witness excused.)

Mr. Bishop: If your Honor please, I had one other thing I would like to put in evidence and I have a little difficulty. What I would like to get into the record would be the provisions of Section IV, subparagraph (d), of the Arizona Corporation Commission Rules and Regulations Concerning Domestic Water Companies, effective January 1, 1950. And I had the Rules and Regulations to offer and I appear to have left them in my office in my hurry to get up here. Perhaps Mr.—

(Document handed to counsel.)

Mr. Bishop: This is a copy of the Rules, it is not certified to. Would you have any objection to this copy being offered in evidence, Bob?

Mr. Royston: Whether it is certified or not, I am not going to make any objection on that basis, but I don't see what you are getting at.

Mr. Bishop: I will be glad to point that out. The provision I am interested in is Section IV, subparagraph (d), of the Rules, effective January 1, 1950, which provide that minimum [34] charges shall apply regardless of whether the residential unit is occupied or unoccupied.

Mr. Royston: No; I have no objection to it going in for that purpose.

The Court: That would be C in evidence.

Mr. Bishop: Yes, your Honor.

(Defendant's Exhibit C marked in evidence.)

The Court: That was paragraph IV (d)?

Mr. Bishop: Paragraph IV (d). That is contained on page 3. With that I will rest, if your Honor please.

Mr. Royston: Rather than put a witness back on we might stipulate that the billing in our case did not comply with subsection c of IV. Will you stipulate to that, Mr. Bishop?

Mr. Bishop: Yes; I will.

Mr. Royston: Did the Court understand that stipulation?

The Court: That the billing made by the Kingman Water Company in this case did not comply with the provisions of subparagraph c of paragraph IV.

Mr. Royston: Yes, sir. And with that stipulation the Government will rest.

Mr. Bishop: I will also stipulate that that provision that Mr. Roylston has just referred to is quite different than the way they arrive at their charges, too.

Mr. Roylston: That is correct. Does the Court wish [35] to hear us?

The Court: Well, I have this difficulty. I haven't read Mr. George's testimony and I imagine that is probably one of the most crucial points in the case; for that reason I was going to suggest instead of arguing, when I haven't read it, that you contemporaneously file a memorandum.

Mr. Bishop: I would be delighted to do that.

The Court: Within ten days. There will be no replies, but each of you within ten days file a brief memorandum stating your respective positions. I am interested particularly in whether or not this tariff governs; if it doesn't govern, why it doesn't. And the matter of estoppel, those other issues that are raised here.

Mr. Roylston: All right.

The Court: I think it is necessary, because I haven't read Mr. George's testimony and I haven't examined some of these other exhibits. It would be kind of difficult to really follow it until I have. If I have the benefit of your memoranda with all of this in front of me I think I can do a better job and probably get it just as fast.

Mr. Roylston: May it please the Court, before we quit completely, let me reoffer that original contract that was never signed, just for the purposes of the record, then if the Court still feels the same about that—

The Court: Is there still an objection to it? [36]

Mr. Bishop: I really don't think there is. What I would like to do—I believe Mr. Sapp read into the record the date of the letter of transmittal and what it said.

Mr. Royston: Yes, sir.

Mr. Bishop: If that is going in I would like to ask, Mr. Sapp, if your file contained any response to that letter of transmittal other than Carl Crook's letter we read into the record?

Mr. Sapp: No; it did not.

Mr. Bishop: Then I have no objection to it going in as an exhibit, if your Honor please.

The Court: That will be Plaintiff's Exhibit 2 in evidence.

(Plaintiff's Exhibit 2 marked in evidence.)

The Court: The matter will stand submitted subject to the filing of the memoranda. [37]

State of Arizona,
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter I attended the trial in the foregoing entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 37 pages of typewritten matter contain a full, true and

correct transcript of my shorthand notes taken by me as aforesaid.

Witness my hand this 5th day of March, 1957.

/s/ FRED L. BAKER,

Official Court Reporter.

[Endorsed]: Filed March 6, 1957. [38]

DEFENDANT'S EXHIBIT B

In the District Court of the United States
in and for the District of Arizona

No. C-467—Prescott

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KINGMAN WATER COMPANY,

Defendant.

DEPOSITION OF IRA M. GEORGE

Before L. O. Tucker, Notary Public.

Appearances:

JACK D. H. HAYES, ESQUIRE,

United States Attorney, by

ROBERT O. ROLYSTON, ESQUIRE,

Assistant United States Attorney,

Appearing for the Plaintiff.

BRICE I. BISHOP, ESQUIRE,

Appearing as Counsel for the Defendant.

(Defendant's Exhibit B—(Continued):

Be It Remembered that pursuant to the stipulation herein contained for the taking of a deposition in the above-styled and numbered cause, the deposition of Ira M. George of Kingman, Arizona, is taken before me, L. O. Tucker, a notary public in and for the County of Mojave, State of Arizona, on the 13th day of September, 1956, commencing at the hour of 2:00 o'clock in the afternoon thereof, at 501 East Oak Street, Kingman, Arizona, on behalf of the defendant in a certain cause now pending in the District Court of the United States, in and for the District of Arizona, wherein the United States of America is the plaintiff and the Kingman Water Company is the defendant.

Stipulation

Mr. Bishop: In accordance with our agreement it is hereby stipulated that the deposition of Ira M. George, on behalf of the defendant herein, may be taken at this time before L. O. Tucker, a notary public in and for the County of Mojave, State of Arizona, at 501 East Oak Street in the City of Kingman, Arizona, under the provisions of the federal rules of procedure.

Is that correct?

Mr. Royston: Yes, sir; that is all right.

Mr. Bishop: And we will waive the signature of the witness to his deposition.

Mr. Royston: We will also waive the signature of the witness to his deposition.

(Defendant's Exhibit B—(Continued):

Mr. Bishop: Very well. Will you please swear
Mr. George?

Thereupon,

IRA M. GEORGE

of Kingman, Arizona, a witness in behalf of the
defendant herein, is publicly sworn to tell the truth,
the whole truth and nothing but the truth, and upon
being examined, testifies as follows:

Direct Examination

By Mr. Bishop:

Q. Mr. George, will you please state your full
name for the record? A. Ira M. George.

Q. And your residence?

A. Kingman, Arizona.

Q. And what is your age, Mr. George?

A. Well, it is nearer eighty than it is anything
else.

Q. And what is your occupation?

A. Well, I am the Kingman Water Company.

Q. You are an officer of the Kingman Water
Company?

A. I am an officer of the Kingman Water Com-
pany.

Q. And what position do you hold with that
company, Mr. George? A. President.

Q. And who are the other officers of the King-
man Water Company?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. Stanley George is vice-president of the Kingman Water Company, and Donald George——

Q. Donald George is the active manager and he is an officer of the Kingman Water Company at this time? A. Yes, sir.

Q. Mr. George, directing your attention to the years from 1944 through and including the year of 1951, which is the period of time involved in this litigation, were you the managing officer of the Kingman Water Company during that period of time? A. Yes.

Q. Are you familiar with what is known as the Vista Solano housing project in Kingman, Arizona?

A. Yes; I am.

Q. You were the managing officer of the Kingman Water Company at the time this project was built, were you not? Is that correct?

A. Yes, sir.

Q. And did you—where is that project located, Mr. George? A. The Water Company?

Q. No; the housing project.

A. Oh, the housing project. That is located in the western part of Kingman.

Q. It is on the west side of town, is it not?

A. Yes, sir.

Q. How many units did it have, do you remember? A. Well, I would say it had 125.

Q. It is your present recollection that this housing project had approximately 125 units. Is that right? A. Yes.

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Q. And did you negotiate the terms for water service to that housing project, on behalf of the Kingman Water Company?

A. Well, I presume you would say that I negotiated the terms for the water service to them, yes; but the law has provided the amount we should charge for that service.

Q. By that, you are referring to your rates?

A. Yes.

Q. Those rates were established by the Arizona Corporation Commission? A. Yes.

Q. But in connection with the servicing to this project, did you discuss that with the representative of the housing authority? A. Yes.

Q. Do you recall with whom it was that you negotiated the servicing agreement for that project—that is, who it was that represented the government during your negotiations?

A. Well, now, they had a man from San Francisco and a man from Phoenix, Mr. Gibson, I believe it was—George Gibson.

Q. Then George Gibson was the government man from Phoenix with whom you negotiated.

Do you recall the name of the man who came from San Francisco? A. No; I don't.

Q. Do you recall where the conferences took place regarding the matter?

A. In Judge Krook's office.

Q. That is Judge Carl Krook? A. Yes.

Q. He is a practicing attorney located here in

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Kingman, Arizona? A. Yes, sir.

Q. And he was your attorney at that time?

A. Yes, sir.

Q. His office is located in the old bank building here in Kingman? A. Yes.

Q. Was there anyone else present during your conferences with Mr. Gibson and the man from San Francisco and yourself?

A. I think that is all that were present.

Q. How many conferences regarding this matter did you have?

A. Oh, we must have had three or four.

Q. And all of them were held in Judge Krook's office? A. Yes.

Q. And do you recall approximately when those conferences were held?

A. (There is no response.)

Q. If you don't remember the exact time, just say so. A. I don't remember the exact time.

Q. Did they precede the time of the initiating this water service to the housing project?

A. Yes.

Q. Would you say they were held shortly prior to that time? A. Yes; they were.

Q. So if the water service to this project started approximately May 15, 1944, then would you say that your conferences took place around the first part of May or around about that time?

A. Yes.

Q. Now, during those conferences, did you, on

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

behalf of the Kingman Water Company, tell the government representatives what you would do?

Just answer that yes or no. A. Yes.

Q. What did you tell them you would do?

A. Well, we told them that the rates were established here for us, and we told them what they were and what they were using, the service that everybody else was getting.

Q. Did you tell them that that would be the basis of your charges at that time? A. Yes.

Q. Were the rates to apply to the individual dwelling units? A. Yes; they were.

Q. Then to rephrase what you have testified to, you agreed to furnish each unit in the project on the basis of your then existing public tariff. Is that right? A. That is right.

Q. And were the units to be metered?

A. Well, we were unable to get meters in those days. We were metering everything in Kingman.

Q. Why were meters unavailable at that time?

A. I imagine because it was during war time was the reason.

Q. Was the unavailability of meters discussed during your conferences? A. Oh, yes.

Q. Now, you have testified as to what you told the government representatives the Water Company would do. Did they agree to that?

A. Yes.

Q. And did they tell you during your conferences with them that was acceptable?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. Yes; they must have or we would not have put the service into effect.

Q. Immediately after that did the Kingman Water Company put the service into effect?

A. Yes.

Q. And did you start billing for this service on that basis from May, 1944, on?

A. Yes. They had a certain number of services and we started the service.

Q. Do you recall how many they had at this time? A. I would say 125.

Q. Now, with respect to the meters, do you recall how many meters were placed on the premises at the project?

A. Well, now, we—it would have been necessary for us to have put in about 125. We didn't have them and we couldn't get them, so that was all made known to the boys in charge of their work.

If those meters had been regularly installed it would have been two dollars and a half per meter.

Q. I see.

A. Two dollars and a half per meter per month.

Q. That would be the minimum charge?

A. That would have been the minimum charge.

Q. And that was discussed during these conferences?

A. Yes; that was discussed during these conferences and it was so understood.

Q. Who was to install and maintain those meters? A. We installed everything.

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Q. Who was to maintain them?

A. The government.

Q. And who procured the meters that were installed?

A. Well, I would say we did, most of them—all we could get.

Q. You got the meters that were available?

A. Yes. We put them on the same service as everybody else in the community.

Q. Now, when did you first receive any notification from the government that they were not happy with the charges? Do you recall that?

A. No; I don't.

Q. Was it a short time after you started furnishing water or a long time after?

A. Well, of course, the service was payable every month, and it had been discussed during that time.

Q. What I mean is during the early part of the operation of the housing project did you in fact receive any complaints about the billing, that you recall?

A. Well, we didn't receive much, if any.

Q. Do you know Mr. Ben Golding?

A. Yes.

Q. Mr. Golding was the resident manager of the project, was he not?

A. Yes.

Q. Did you receive any complaints during his administration of the housing project?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. He just made reports of what the conditions were.

Q. I mean with respect to overcharges?

A. Oh, no.

Q. Do you recall when you first heard about a complaint regarding overcharges?

A. Well, it must have been a long time, for the reason that these charges were not any different from those made to anybody else in the community, what they were paying for the service. It was the same service charge.

It was two dollars and a half for a minimum of three thousand gallons per month.

Mr. Bishop: That is all.

Cross-Examination

By Mr. Royston:

Q. Mr. George, when these men from San Francisco and I believe you said Mr. Gibson from Phoenix came here and talked to you, at that time there was a discussion about entering into a written contract, do you recall?

A. I do not recall that but there may have been because in a service of that size we would always make a written contract for the benefit of both sides.

Q. And do you recall whether they brought a written contract with them and for some reason or other it was never signed?

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Do you recall that?

A. No; that I don't understand.

Q. Actually the first written contract you had with the government on this project out here was in 1951. Is that right?

A. Well, I rather believe it was in '52 or '53.

Q. It was along at about that time that the corporation commission was having those hearings on this matter up here at Kingman.

You recall that when the corporation commission sat at Kingman and some government men came before the commission with a complaint for overcharge for the years 1944 to and around 1951. Do you recall that?

A. I don't.

Q. Well, as far as you can remember then, some time in early 1951 or 1952, you did—your company did enter into an agreement concerning these water rates out at this project.

Isn't that right?

A. We were supposed to. I don't remember of it ever being——

Q. I am talking about the one along in 1951 or 1952 that was actually signed, and then as far as I know you operated under that agreement the rest of the time that this housing project was operated.

Do you recall that agreement, Mr. George?

A. Well, I don't know that I do especially that one. But I know when we had a contract with people for service we always tried to complete the agreement.

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

Q. Yes, sir. The point I am trying to get at, Mr. George, is that your company and the government never had a written agreement for the first several years that water was furnished out there.

Isn't that right?

A. That may be about right.

Mr. Bishop: I can stipulate to that if you want it.

Mr. Royston: All right.

Q. During this time that you operated without a written contract, that is the period we have in question, where it was two fifty per month out there?

A. That is right. That is the same payment that other people made.

Q. During this time there was never anything filed with the corporation commission concerning this particular project out there and the rates charged there.

Is that right?

A. That may be right but I don't know why it should be right, because the corporation commission, when they found out there were that many customers in a case they always wanted to know whether there was a contract or agreement.

Q. As far as you know the first thing that was filed with the corporation commission in connection with this housing project, that was in 1951 or 1952. Is that right?

A. I don't remember. As far as I know there

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

was some talk about a proposed written contract that was never signed in 1944, and no contract was entered into until July of 1951.

Mr. Royston: That is the way I had it.

Q. What I am getting at, Mr. George, during this period from 1944 to 1951, as far as you are concerned you were operating under that tariff rate which was filed with the corporation commission back in 1919. Is that right?

A. I don't know what time it was, but I do know that they didn't permit us to carry on any business without having an agreement—without having a written agreement.

Q. In other words, as far as you know you were billing the housing project out there at the same rate of fees as you were billing every other water user in Kingman. Is that right?

A. Well, I don't know as to every other one.

Q. What I am trying to get at, Mr. George, is that your ordinary water user pays two fifty per month?

A. Yes.

Q. And you were charging each unit out there two fifty per month. Is that right?

A. Yes. That was all by agreement.

Q. Then there is a sliding scale for excessive amounts of water used that you follow?

A. Yes.

Q. And you were following that scale and applying it to each of the units out there—or do you recall?

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

A. No; that I don't recall. That is twelve or fifteen years ago.

Q. Yes. Now, were there four meters out there at this project? A. Four meters?

Q. Do you recall how many meters were actually used on that project? Was four the number that were used out there on the project?

A. Those are large meters; those were not the individual meters.

Q. But all of the water that went into the project went through one of four meters. Is that correct? A. (There is no response.)

Q. Let me ask you this: The water that you furnished to the project out there had to go through one of these four meters that were set there. Is that right? A. (There is no response.)

Mr. Royston: If you don't recall, Mr. George, that is all right.

The Witness: No; I don't recall that.

Q. What I am leading up to, Mr. George, is the reason taken for the monthly billing. Do you recall that? A. No; I didn't get this myself.

Q. I see. Now, Mr. George, when the monthly billings were made up, the first thing that you billed for was the two fifty per month per unit?

That is the first thing that you considered in making up the monthly bill, two dollars and a half each month per unit? A. Yes.

Q. And if there were 120 units there and you charged two fifty per month per unit——

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

A. Yes.

Q. ———that would make a base of three hundred dollars. Isn't that right?

A. Whatever that totals.

Q. What I am leading up to, Mr. George, each monthly bill was billed on a total of 120 units rather than on the number of units that were occupied. Is that right?

A. That is right. That was the arrangement made by our men and the government men.

Q. So your office did not consider the fact that, say, fifty of the units would be unoccupied; as far as your billing was concerned, you still billed them for the 120 units?

A. Yes. But there was never anything like that. There might have been 20 units——

Q. What I am trying to get at, Mr. George, is that you billed as if you were furnishing water to 120 units of the project, and you billed for that number whether they were occupied or unoccupied. Isn't that right?

A. We billed them according to the agreement that was entered into with the—with your local representatives.

Q. Was that the agreement, that you charged two fifty per month per unit whether it was occupied or unoccupied?

A. I imagine it was, because I don't know why it should be different.

Q. Mr. George, this oral agreement that you en-

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

tered into with the man from San Francisco and Mr. Gibson, do you know why that was never written down?

A. No; I don't. I have an idea the attorney would have that record.

Q. I just thought you might remember some particular reason?

A. No; that is ten or twelve years ago.

Q. Yes, sir. Do you recall, Mr. George, whether there was any agreement about placing separate meters in the future, with these men, with these men whom you discussed the contract with?

A. Yes.

Q. Was it——

A. If either one of us were able to get them we were to put them in.

Q. That is, a separate meter for each unit of the project? A. Yes.

Q. So far as you recall, was that project supplied with separate meters? A. No.

Q. It operated through these same large meters you mentioned?

A. Yes—wait a minute. Those large meters came through those service pipes, which was four-inch pipe that brought the service—that brought the water in from the wells. They are the only ones—that is, the water that went into those big meters.

Q. During the time that that project was operated out there there never was individual meters put in on that project?

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

A. There may have been a few but not very many, because we couldn't get them.

Q. Yes, sir. These men who are the officers of the corporation, other than yourself, are they your sons? A. The Kingman Water Company?

Q. Yes, sir. A. Yes; they were.

Q. Were any of those sons present during any of these conferences?

A. They negotiated most of them.

Q. And these representatives from San Francisco and Mr. Gibson, did they have conferences with your sons concerning the water rates at the housing project out there?

A. I presume one would go in the office and ask who these men were and what service they got.

Q. Did this Mr. Golding and you ever discuss the water rates out there, or was your only discussion with these men from San Francisco and Phoenix?

A. Mr. Golding—he was in charge. He very often would come in and tell us about some condition that was wrong, and our man would go out with him.

Q. I mean the charge you were making for the water, you never had any discussion with him about that?

A. We never tried to make it any different from what anybody paid here in Kingman.

Q. Your conferences were with the men from

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

San Francisco and Mr. Gibson from Phoenix; this whole matter was settled as to your charge?

A. As far as I know, it was, yes.

Q. And Mr. Golding came in sometime after that. Is that right?

A. Yes. He became manager of the operation, I think.

Q. Yes, sir. Mr. George, I have a copy of the transcript of a hearing that was held before the corporation commission that was held up here in Kingman in '52.

Now, according to your testimony which you gave at that time you testified that you furnished—that you charged only on the basis of the number of occupied units at this housing project.

When you made that statement were you mistaken at that time?

First, do you recall of stating it in that way at that hearing? A. (There is no response.)

Q. The way they took down your testimony at that time, you stated that you billed at the rate of two fifty per month per occupied unit rather than for 120 units.

Today you have stated that you billed for two fifty per unit per month whether the units were occupied or unoccupied.

Do you remember of testifying in that way before the corporation commission in 1952?

A. In 1952?

Q. Yes, sir.

A. No, I can't.

(Defendant's Exhibit B—(Continued):

(Deposition of Ira M. George.)

Q. Well, if you did testify in that way when you made that statement, you were mistaken at that time. Is that right?

A. Yes. But I don't think I made it.

Q. But the way you recollect it now there never was any allowance made for unoccupied units?

A. No.

Mr. Royston: I believe that covers everything I wanted to ask you, Mr. George.

Do you have anything further, Mr. Bishop?

Mr. Bishop: No, I have nothing further.

Certificate of Notary

Be It Known that I, L. O. Tucker, took the foregoing deposition pursuant to the stipulation herein contained, at the time and place stated in the caption hereto;

That I was then and there a notary public in and for the County of Mohave, State of Arizona; that by virtue thereof I was authorized to administer an oath; that the witness, Ira M. George, before testifying, was duly sworn to testify the truth, the whole truth and nothing but the truth;

That the testimony given by the witness was reduced to writing by me, and that the signature of the witness thereto is waived by counsel in their stipulation herein.

I further certify that I am not of counsel nor attorney for either or any of the parties to said

(Defendant's Exhibit B—(Continued):
(Deposition of Ira M. George.)

action or otherwise interested in the event thereof;
and that I am not related to either or any of the
parties to said cause.

In Witness Hereof I have hereunto subscribed
my name and affixed my seal of office this 6th day
of October, 1956.

[Seal] /s/ L. O. TUCKER,
Notary Public.

My commission expires January 5, 1957.

Admitted in evidence February 1, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States
District Court for the District of Arizona, do hereby
certify that I am the custodian of the records and
files of said Court, including the records and files in
the case of United States of America, Plaintiff,
versus Kingman Water Company, Kingman, Ari-
zona, Defendant, numbered Civ-467 Prescott, on the
docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached copy of civil docket entries of judgment and amendment thereto is a true and correct copy of the original thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Plaintiff's Complaint.
2. Defendant's Answer.
3. Reporter's Transcript.
4. Deposition of I. M. George (Defendant's Exhibit B).
5. Minute entry of February 1, 1957 (proceedings of trial).
6. Minute entry of February 25, 1957 (memorandum decision).
7. Minute entry of March 14, 1957 (order directing entry of judgment).
8. Findings of Fact and Conclusions of Law.
9. Civil Docket Entries of March 19 and May 14, 1957 (Clerk's Notation of Entry of Judgment in Civil Docket).
10. Defendant's Motion to Dismiss.
11. Defendant's Motion for New Trial.
12. Defendant's Supplement to Motion for New Trial.

13. Defendant's Motion to Amend and Supplement Findings of Fact and Conclusions of Law.

14. Defendant's Supplement to Motion to Amend and Supplement Findings of Fact and Conclusions of Law.

15. Minute entry of April 8, 1957 (hearing on motions after judgment).

16. Minute entry of May 14, 1957 (order amending findings and judgment and denying motions).

17. Notice of Appeal.

18. Bond for Costs on Appeal.

19. Designation.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, as designated, to wit:

Plaintiff's exhibits 1, 2, 3, 4 and 5, in evidence.

Defendant's exhibits A, B and C, in evidence (exhibit B is same document as item No. 4 of this certificate).

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$5.20 and that said sum has been paid by counsel for appellant.

Witness my hand and the seal of said Court this 14th day of August, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15678. United States Court of Appeals for the Ninth Circuit. Kingman Water Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed August 16, 1957.

Docketed: August 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15678

KINGMAN WATER COMPANY, Kingman,
Arizona,

Appellant,

vs.

UNITED STATES OF AMERICA, Housing Au-
thority of Mohave County, Arizona,

Appellee.

APPELLANT'S STATEMENT OF POINTS
UPON WHICH IT INTENDS TO RELY

Pursuant to Rule 17(6), Rules of the United States Court of Appeals for the Ninth Circuit, appellant, Kingman Water Company, files herewith its Statement of the points upon which it intends to rely on said appeal as follows, to wit:

1. The defendant, Kingman Water Company, in the performance of the services rendered to plaintiff, United States of America, was acting in a private capacity and therefore free from all regulations of the State of Arizona pertaining to public service corporations and all regulations promulgated by the Arizona Corporation Commission and tariff rates on file with the Arizona Corporation Commission. Therefore, the Court erred in making its Findings of Fact Nos. 3 and 7, to the effect that the capacity in which defendant performed said services was a

public utility, and in making its Conclusion of Law No. 3 that any agreement between plaintiff and defendant for water service at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void, it appearing that under Arizona law, a public utility may also have private activities and that when a public utility acts in a private capacity, its conduct is governed only by rules applicable to private contracts in general and not by rules applicable to public utilities in the performance of their public duties. The factual premise upon which defendant's capacity is based is that a public utility may lawfully refuse to serve a multiple unit dwelling through master meters, and defendant did refuse to serve through master meters except upon the meeting of certain conditions. Therefore, what defendant did was done pursuant to its contract with plaintiff and not pursuant to a duty which it was required to perform as a public utility, and as such, these activities were not at all governed by any of the regulatory statutes of the State of Arizona or by its tariff rate on file with the Arizona Corporation Commission.

2. There was not, as a matter of fact or as a matter of law, any variance between the filed rate and the rate actually charged by defendant, in that the contract between the parties was actually a device employed by them to conform the charged rates to the filed rates, with the result that there was not any variance whatever. Therefore, the Court erred in making its Finding of Fact No. 8 and its Conclu-

sion of Law No. 6, to the effect that plaintiff was overcharged by the defendant, and the Court further erred in making its Conclusion of Law No. 4, to the effect that the rate on file did not permit the charge of a monthly minimum per residence unit. The factual premise upon which this point is based is that defendant's tariff both authorized and required it to receive a minimum charge for each unit served. However, under particular conditions created by World War II, resulting in severe shortages of materials, individual meters were not available and it was necessary to render service without individual meters and by use of master meters in lieu thereof. In view of these circumstances, it was agreed that billings for water consumed would be made "as if" individual meters were actually in place at each of the dwelling units, and the result of this fiction was merely to conform the charges made to plaintiff to the charges being paid by all other consumers in the community, and the end result therefore was one of strict conformance to the filed rates and in no wise a variance therefrom. Moreover, apart from fact, the law is such that a minimum charge authorized is not to be computed by the number of meters through which water passes, but by the number of consumers served by the meters employed.

3. The Complaint of plaintiff on file herein fails to state a claim against defendant upon which relief can be granted, and alleges facts precluding such recovery in that said Complaint affirmatively establishes that the payments sought to be recovered

herein were made voluntarily and under claim of right and with full knowledge of the facts. It is well established by the substantive law of the State of Arizona that such a Complaint does not state a claim and that a plaintiff, under such circumstances, is precluded from recovering any such payments. The Court therefore erred in denying and in failing to grant defendant's Motion to Dismiss upon the ground above stated.

Dated this 22nd day of August, 1957.

BRICE I. BISHOP and
DONALD R. KUNZ,

By /s/ BRICE I. BISHOP,
Attorneys for Appellant,
Kingman Water Company.

Affidavit of service by mail attached.

[Endorsed]: Filed August 24, 1957.

No. 15,678

In the
United States Court of Appeals
For the Ninth Circuit

1957 TERM

KINGMAN WATER COMPANY,
a corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona

BRICE I. BISHOP and
DONALD R. KUNZ

707 Title and Trust Building
Phoenix, Arizona

Attorneys for Appellant

FILED

DEC 23 1957

PAUL P. O'BRIEN, CLERK

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No. 15678

In the

United States Court of Appeals

For the Ninth Circuit

1957 TERM

KINGMAN WATER COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona

Replying to: Appellee's Statement of the Case

Appellee's Statement of the Case is, for the most part, an accurate presentation of the matters set forth in the transcript of record and, in most particulars, conforms agreeably with the Statement of the Case made in appellant's opening brief.

However, appellee's Statement of the Case makes what we believe to be an unwarranted assumption which is not supported by the record and which cannot pass unheeded. We speak in this regard of the agreement for water service between appellant, Kingman Water Company, and appellee, United States of America. Appellee's Statement of Fact contains the following statement:

“The only agreement in effect during the years in question was an *implied* agreement based on the fact that water was furnished by the appellant and accepted by the appellee. * * * *the trial court found that the only contract in existence was the implied contract* * * *” (Emphasis supplied.) (Appellee’s Brief, Pages 2-3)

We respectfully submit that the above statement represents nothing more than appellee’s conclusion inasmuch as the above was not at all found by the trial court as is witnessed by the findings of the trial court, to wit: Finding of Fact No. 5 (T.R. 14) to the effect that “plaintiff entered into a contract with defendant”, said finding not containing any direct statement as to whether said contract was express or implied; and Conclusion of Law No. 3 (T.R. 15) to the effect that “any agreement between plaintiff and defendant for water services at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void.” These are the only findings made by the trial court with reference to any contract or agreement between the parties, and, as the findings witness, the Court did *not* find an implied contract, for certainly, if the trial court had intended to find a contract by nothing more than mere implication, it would have so stated and would not have used the words “entered into”, which universally imply express negotiations of some kind; moreover, on the other hand, the trial court concluded that a contract at a “different rate” would be void, *which finding could relate only to the oral contract of which there was considerable and uncontradicted evidence.*

We therefore respectfully submit that the conclusion of appellee that the only agreement in effect herein was an implied contract is contrary to the findings of the trial court and to the evidence set out in the transcript of record.

Replying to: Appellee's Argument—Issue No. 1

Most of the discussion made by appellee under this division wholly begs the question presented by appellant's opening brief. We believe that these matters should be pointed out.

At Page 4 of its brief, appellee states that the subject housing project was located within the area served by appellant and that appellant was therefore obligated to serve all who applied, and that the government applied for water service and that such service was furnished. In the first instance, appellee is in error in its statement that appellant was "obligated to serve all who applied" to it for service. As pointed out in appellant's opening brief, a public utility is obliged to serve *only when the service sought is that type of service which a public utility is under a duty to supply* and is under no obligation whatever outside of that duty. Appellee completely avoids this issue and relies simply upon the fact that service was furnished, irrespective of whether such service was furnished as a public or private activity.

Appellee next refers, at Page 4 of its brief, to the Arizona Statute, A.R.S. 40-374, and makes the statement that said statute "prohibits any change" other than as set forth in the schedule on file. As pointed out in appellant's opening brief, the statute referred to makes no such provision but simply prohibits any change *in the amount of compensation*. Moreover, if, as appellant's brief points out, the services rendered were in the nature of a private activity, then this statute could have no application whatever.

Appellee next discusses, at Page 4 of its brief, the procedure to be followed in Arizona for changing a filed rate and states that "if an oral agreement was entered into between the parties hereto for the purpose of establishing a

different rate * * *, appellant should have proceeded under the statute." As the record shows, the purpose of the oral agreement was not designed to establish a different rate but to adhere strictly to the rate on file. This fact is supported, employing the very argument used by appellee, by the fact that no application for change of rate was made, indicating that no change of rate was intended. Obviously, the only "change" was one in the method of delivery, and not in the amount of compensation.

At Page 5 of its brief, appellee cites several authorities to the effect that the fact that a governmental agency was the consumer hereunder does not render the Arizona regulatory statutes inapplicable. We fail to see what bearing these authorities have upon the issue under discussion inasmuch as no argument has been made in appellant's opening brief that the regulatory statutes were inapplicable because the United States was appellant's customer. On the contrary, it is appellant's position that the rules of law set forth under Issue No. 1 of appellant's opening brief are applicable to customers of a public utility regardless of their governmental or private capacity; appellant was either under a duty to sell to appellee through master meters or it was not under such a duty, regardless of appellee's sovereign status.

Likewise, at Page 5 of its brief, the citation by appellee of authority to the effect that rates prescribed by a contract entered into *prior* to the enactment of a statute creating a public service commission is wholly inapplicable to this case inasmuch as all parties concede that the Arizona Corporation Commission existed long before any dealings took place between appellant and appellee.

We also take issue with appellee's statement that the case of *U.S. v. Oklahoma Gas & Electric Co.*, 297 Fed. 575, presents a situation identical to the present case. As a reading of that case will disclose, the facts therein concerned a

contract and a change of rate by the state regulatory body, differing from the rate contracted for. There is, therefore, a very considerable factual distinction between the two cases. From a strictly legal point of view, we do not question the authority of the case in so far as it bears upon the *public* activities of a public utility. However, in the instant case, it is clear that appellant was acting in a private capacity and such authority is therefore wholly inapplicable to the facts of this case.

It is difficult to reconcile appellee's statement, at Page 6 of its brief, that there is "no evidence" to support the fact that the United States requested delivery of water through master meters on given terms and that appellant refused such service upon the terms requested. As pointed out by appellant's opening brief, and as appellee admits, a written contract incorporating such terms was tendered to appellant by the United States and the same was flatly rejected. It would seem that no better evidence could be desired.

Appellee next attempts, at Page 7 of its brief, to distinguish the cases of *Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners*, 107 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352, *Lewis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 F.2d 701, and *Florida Power and Light Co. v. State of Florida, ex. rel. Malcolm*, 107 Fla. 317, 144 So. 657 by pointing out that said cases deal with fact situations wherein the property owner intended to resell the commodity to his tenants. If there had been no such arrangement contemplated in this case, appellee's attempt to distinguish the above cases might be well taken. However, the contract tendered by the United States *specifically provided that the government might sell the water sold to it to its tenants.*

It therefore appears that the authorities cited are strictly in conformance with the intent of the United States as stated in the contract, which contract was prepared by the government itself.

In view of the terms of the tendered contract, it appears strange that appellee then makes the further argument, at Pages 7 and 8 of its brief, that it was “not the intent” of the government to sell the water. Appellee apparently arrives at this conclusion upon a consideration of what was actually *done* rather than what the government would have had a right to do had the contract been entered into. We respectfully submit that what was actually done can have no bearing whatever upon the rights which the government would have had under the contract, which contract specifically provided that the United States could sell the water to its tenants.

Regarding the rule of *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210, appellee’s brief makes the suggestion, at Pages 8 and 9 of its brief, that the rule of the *Kasun* case should not apply to utilities other than municipal utilities. There is nothing whatever in the *Kasun* decision to support such a proposition and, on the other hand, there is abundant authority in Arizona to the effect that every municipal utility is governed by the same rules of law which apply to any private corporation. *Gardner v. Industrial Commission*, 72 Ariz. 274, 233 P.2d 833; *Sumid v. City of Prescott*, 27 Ariz. 111, 230 P. 1103; *City of Tucson v. Sims*, 39 Ariz. 168, 4 P.2d 673; *City of Phoenix v. State ex rel. Conway*, 53 Ariz. 28, 85 P.2d 56; *Crandall v. Town of Safford*, 47 Ariz. 402, 56 P.2d 660.

In conclusion, appellee’s brief contains no citation of authority under Issue No. 1 to support the premise that appellant, in the performance of its agreement with appellee,

was acting *as a public utility*. Unless such a proposition can be sustained, there can be no reason for applying the regulatory statutes involved herein and, if such regulatory statutes do not apply, then, this cause must be reversed.

Replying to: Appellee's Argument—Issue No. 2

Under this division, appellee's argument states that the ambiguity of the 1919 water rate cannot be affected by the circumstances existing in 1944. This statement is obviously the result of appellee's failure to distinguish between ambiguity as to *compensation* on the one hand and ambiguity as to *method of delivery* on the other hand. As examination of the 1919 water rate will disclose, there was no ambiguity as to the amount of compensation to which appellant was entitled. The only question, therefore, was whether under the 1944 contract and the wartime conditions existing in 1944, the 1919 rate required an actual physical meter; i.e., was an actual physical meter required for each housing unit in order to secure the right to the "minimum charge" referred to in the rate; stated in another way: Did the delivery *have* to be through a meter to warrant a minimum charge? It is here at this point, in construing the 1944 contract, and in reconciling its terms with the 1919 rate, that the surrounding circumstances in 1944 necessarily had to be considered. The evidence is clear that, except for the circumstances existing in 1944, individual meters would have been installed. Had that been done, there could be no question as to appellant's right to receive the monies which have been paid to it. The question, therefore, is solely whether the 1944 circumstances would warrant the method of delivery employed in the 1944 contract. We respectfully say that those circumstances did so warrant them, by an

agreement to bill the United States strictly at the tariff rate, "as if" actual meters had been installed. This was a matter which *did not affect the amount of compensation, but only the method of delivery*, and therefore did not require a modification in appellant's tariff, for in either case, the *amount paid would be the same*.

Appellee next attempts to distinguish the case of *Brubaker and Bros. v. Millersburg Water Company*, P.U.R. 1929 A, 808, upon the ground that the utility had a written rule requiring a separately controlled service line. It is obvious that such a rule would merely be identical to a rule by which a utility could refuse to sell through a master meter, the same constituting an identical statement phrased in a different way. Considered in this light, there is no requirement that the tariff of a utility contain such a rule in writing, inasmuch as *such rule may exist only in the "practice" of the utility*; see for example: *Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners*, 107 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352; *Lewis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 F.2d 701; *Moebs v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 Fed. 703 and *Florida Power and Light Co. v. State of Florida*, ex rel. Malcolm, 107 Fla. 317, 144 So. 657. It thus appears that the rule of the *Brubaker* case applies fully notwithstanding that the tariff contains no such writing requiring a separately controlled service line, inasmuch as the right of a public utility to follow such a practice is recognized merely as a matter of logic, if that is its practice, and that such was the practice of appellant is sustained by the record. We note that, with the exception of the above attempt to distinguish the *Brubaker* case, appellee offers no grounds upon which the *Brubaker* case should not be applicable.

Further, regarding the case of *Noble v. City of Troy*, P.U.R. 1932 C, 256, appellee points out that in that case no meter was employed whatever, and still the utility was entitled to charge a service charge to each separate user. The case demonstrates again that service charges are governed by the number of consumers and not by the number of meters employed. If appellee's argument herein were to be followed to its conclusion, it would be seen that the law which appellee advances would have denied any compensation whatever to the utility in the *Noble* case merely because there was no meter employed. Such conclusion demonstrates the error inherent in appellee's reasoning.

In conclusion, appellee once again seeks to belittle the tremendous impact of the wartime circumstances under which service was rendered to it, and, on the contrary, seeks to employ such circumstances in preventing appellant from retaining what it otherwise would clearly have been entitled to receive. While this proceeding is not equitable in nature, we believe that there is a point beyond which the law will not tolerate the turning of circumstances to unfair advantage. We also note that appellee cites no authority whatever to sustain its proposition that the number of service charges chargeable is governed solely by the number of meters in use, which is the proposition upon which appellee's whole case turns.

Replying to: Appellee's Argument—Issue No. 3

Under this division appellee relies solely upon a purported rule of law that the general rule of law that a person cannot recover money paid under mistake of law does not apply when the United States is the party making the payment. Three cases are cited in support of the purported

rule exempting the United States from the universally accepted rule precluding recovery of payment, said cases being *Brooklyn and Richmond Ferry Co. v. United States*, 167 Fed. 2nd 330; *United States v. Wurts*, 303 U.S. 414, and *Wisconsin Central Railroad v. United States*, 164 U.S. 190. Each of these cases are clearly distinguishable from the present case, and moreover it will be seen that these cases, when considered from earliest pronouncement to latest pronouncement, constitute “pulling oneself up by one’s boot straps”, resulting in the purported creation of a rule of law with no common law to support it.

The case principally relied upon by appellee is the case of *Brooklyn and Richmond Ferry Co. v. United States*, *supra*. This case purports to lay down the rule that “the rule barring recovery of payments under mistake of law” as it bears upon payments made by the United States, is subject to a “well known exception”. It thus appears that the *Brooklyn and Richmond* case purports to state an established rule of law, and to that end the opinion in the *Brooklyn and Richmond* case cites cases which purport to support the rule stated therein. Upon examination however, it will be seen that the rule as cited in the *Brooklyn and Richmond* case is not at all supported by the cases cited as supporting it, as follows, to wit: *Wisconsin Central Railroad v. United States* (being another of the cases cited by appellee, *supra*) is readily distinguishable from the case at bar upon the ground that in that case the Post Office Department had paid a carrier more than its contract rate for carriage of mail, and a *United States statute* (R.S. Sec. 4057) specifically directed the Post Master General to sue to recover such overpayment. As such, the *Wisconsin Central Railroad* case specifically went off upon a particular United States statute; there is no similar statute in this case. The two cases are therefore readily distinguishable and we

respectfully submit that in no case does a rule of law derived from a statute create an identical rule as common law. In short, the *Wisconsin Central Railway* case is no authority whatever for the rule of the *Brooklyn and Richmond* case or for the proposition upon which appellee relies herein.

The next case cited in the *Brooklyn and Richmond* case is the case of *United States v. Wurts* (also cited by appellee, *supra*). The rule of law declared in that case is that monies which are *wrongfully* paid may be recovered. This may be quite true, but is no authority whatever for the rule of the *Brooklyn and Richmond* case that payments made under mistake may be recovered. As pointed out in 40 Am. Jur., Payments, Sec. 209, Page 859, there is a clear distinction between what is merely a mistake and what actually is in violation of some positive rule of law. As stated in the text cited above:

“A distinction has been drawn between a payment made in direct violation of law and a payment made under a mistake of law, it being held that where an officer makes a payment and the account is within his general jurisdiction but the payment is made under a mistake of law, there can be no recovery, but where the payment is made in direct violation of law there may be recovery”.

The *Wurts* case is therefore clearly distinguishable upon the grounds that in the instant case there was nothing either wrongful or illegal about the payments made to appellant, the only question being whether there had been a mistake as to the basis of computation of the amounts so paid.

It thus appears that the “well known exception” referred to in the *Brooklyn and Richmond* case is one without substance and contrary to its own cited authority. We respectfully submit that there is and should be no rule of law

exempting the United States from the operation of substantive rules of law of a sovereign state bearing upon voluntary payments, and that the rules heretofore advanced by appellant are wholly applicable.

We also note that appellee makes no attempt whatever to discuss or to distinguish the rule laid down by the Ninth Circuit in *United States v. Skinner and E. Corporation*, 35 Fed. 2nd 889, wherein this Court adopted the rule upon which appellant relies herein.

Appellee concludes its discussion under this division with citation of authority bearing upon estoppel. We concede that this proposition was argued at the trial level, but the question of estoppel has not been presented in appellant's opening brief and we fail to see how the question of estoppel is properly raised upon this appeal. It need only be noted that estoppel is equitable in nature and exists separate and distinct from the rules of common law advanced by appellant as bearing upon recovery of voluntary payments.

General Conclusion

In conclusion, we respectfully submit that the authorities cited in appellee's brief do not constitute justification for the rulings of the trial court appealed from herein, and that this cause should be reversed with instruction to enter judgment for the defendant, Kingman Water Company, upon the grounds and for the reasons set forth in appellant's opening brief.

Respectfully submitted,

BRICE I. BISHOP and

DONALD R. KUNZ

707 Title and Trust Building
Phoenix, Arizona

Attorneys for Appellant

No. 15678

In the
United States Court of Appeals

For the Ninth Circuit

1957 TERM

KINGMAN WATER COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the District of Arizona

BRICE I. BISHOP and
DONALD R. KUNZ

707 Title and Trust Building
Phoenix, Arizona

Attorneys for Appellant

FILED

OCT 20 1957

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No. 15678

In the

United States Court of Appeals

For the Ninth Circuit

1957 TERM

KINGMAN WATER COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the District of Arizona

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

The jurisdiction of the Court below was predicated upon 28 U.S.C. Sec. 1345, in that the United States of America was a party plaintiff. The jurisdictional facts, as set out above, were pleaded in plaintiff's Complaint (T.R. 3) and admitted in defendant's Answer thereto (T.R. 6).

B. Jurisdiction of the Court of Appeals.

The jurisdiction of the Court of Appeals rests upon 28 U.S.C. Sec. 1291, as an appeal from a final decision of a

District Court, and appeal was timely taken as follows, to wit: on March 14, 1957, the United States District Court for the District of Arizona, Honorable James A. Walsh, United States District Judge, presiding, made and filed its Findings of Fact and Conclusions of Law (T.R. 13-16), and Judgment was entered in the Civil Docket in favor of plaintiff on March 19, 1957 (T.R. 16). On March 25, 1957, defendant served its Motion to Amend and Supplement Findings of Fact and Conclusions of Law (T.R. 24-26), Motion for New Trial (T.R. 20-21), and Motion to Dismiss (T.R. 17). On March 28, 1957, defendant served its Supplement to Motion for New Trial (T.R. 21-23) and Supplement to Motion to Amend Findings of Fact and Conclusions of Law (T.R. 28-30). Thereafter, on May 14, 1957, the Court below entered its order amending the Findings of Fact and Conclusions of Law made and filed on March 14, 1957, its further order denying defendant's Motion to Dismiss, Motion for New Trial and Motion to Amend and Supplement Findings of Fact and Conclusions of Law and its further order amending the judgment therefore entered (T.R. 32-33; 16). On July 12, 1957,¹ defendant filed its Notice of Appeal (T.R. 33), and the record was filed and the Appeal docketed on August 16 and 22, respectively (T.R. 99).

STATEMENT OF THE CASE

A. Background of the Action.

In 1943, Plaintiff-Appellee, the United States of America, acting by the Federal Public Housing Administration, undertook plans to establish a wartime housing project at the City of Kingman, County of Mohave, State of Arizona.

1. Time for filing Notice of Appeal herein is 60 days as to all parties, rather than the usual 30 days, because the United States is a party hereto; Rule 73, Federal Rules of Civil Procedure; 28 U.S.C. Sec. 2107.

This project, known as "Vista Solana Homes", was subsequently constructed in 1944, and consisted of 120 dwelling units (T.R. 3-6; 6-8; 36-38).

Defendant-Appellant, Kingman Water Company, is, and at all times material hereto was (as to its general activities)² a corporation doing business as a public utility at the City of Kingman, County of Mohave, State of Arizona, engaged in the supplying of water for public use (T.R. 3; 6). As a public utility doing business in the State of Arizona, Defendant at all times had on file with the Arizona Corporation Commission its schedule of water rates, denominated "Tariff No. 1" (Plaintiff's Exhibit 1 in Evidence; T.R. 40-41). Said schedule established that for commercial water rates the Kingman Water Company was entitled to receive "\$2.50 minimum rate of 3000 gallons", together with decreasing rates for increasing quantities of water, all as set forth in the schedule. The schedule further provided: "All connections metered." This schedule bore date of August 12, 1919, and was in force and effect at all times material hereto (T.R. 40-41).³

In 1943, prior to the actual construction of the project in 1944, and while the project was still in the planning stages, the Federal Public Housing Administration entered into negotiations with the Kingman Water Company for the supplying of water to the project (T.R. 36-37). The evidence and testimony on the trial of the cause indicate that when the project was in the planning stages it was contemplated that each of the 120 units would be served by an individual water meter (T.R. 72), and the negotiations between the

2. The distinction between the general activities of a public utility and certain of its other activities is hereinafter more fully developed; see Argument, I (Issue No. 1), *infra*, page 14, et seq.

3. The full text of "Tariff No. 1" is set out in the appendix at the close of this Brief, as "Exhibit A" to Plaintiff's Complaint.

Federal Public Housing Administration and Defendant were conducted upon that basis.

However, when actual construction of the project was commenced, it was found that such individual meters were not available due to shortages of materials brought about by World War II (T.R. 64-65; 83). Accordingly, the contemplated construction plans were adjusted to the factual situation, and service lines to the 120 units were established through four "master meters" and without employment of the contemplated individual meters (T.R. 51-53; 58-59).

On April 20, 1944, prior to the time that any water had been delivered by defendant, a draft of a proposed contract between the United States of America and Defendant was sent to Defendant by the Federal Public Housing Administration. This draft of contract (Plaintiff's Exhibit 2 in Evidence),⁴ proposed that Defendant provide water through "master meters", the readings of such master meters to be considered as one for the purpose of rates and billings. The proposed contract further specifically provided that upon delivery of the water to plaintiff, said water would cease to be defendant's property and title thereto would pass to plaintiff, and that plaintiff would own and operate a "secondary water distribution system" and could "sell or otherwise distribute water to the tenants as an incident of tenancy" (Plaintiff's Exhibit No. 2 in Evidence, T.R. 42-43).⁵ By letter dated May 8, 1944, Defendant, by its then counsel, Carl G. Krook, acknowledged receipt of the proposed contract and rejected the same, advising the Federal

4. Plaintiff's Exhibit 2 was not printed in the Transcript of Record. Its full text, however, is set out in the appendix at the close of this brief.

5. It will be noted that Plaintiff's Exhibit 2 was originally denied admission into evidence. T.R. 42-44. At a later point, however, the objection was withdrawn and the exhibit received into evidence. T.R. 76.

Public Housing Administration "that the proposed agreement is not satisfactory in view of the many changes in the field". The letter concluded by requesting the Federal Public Housing Administration to send a representative to Kingman, Arizona, for discussion and negotiation (T.R. 53-54). It is undisputed that the Kingman Water Company did not at any time execute this proposed contract or otherwise agree to provide water service during the period in question upon the terms therein provided (T.R. 37).

Thereafter, officials of the Federal Public Housing Administration conferred in Kingman, Arizona, with I. M. George, president of defendant, regarding the situation (T.R. 81-82). It was acknowledged, upon discussion, that if individual meters had been regularly installed, defendant would have received a \$2.50 minimum charge for each such individual meter (T.R. 84); that is to say, the same charge as was then being made to any other user in the community and the charge authorized by defendant's rate on file with the Arizona Corporation Commission (T.R. 86). It was also acknowledged that individual meters were then unavailable—defendant did not have the requisite number of meters and neither party could get them (T.R. 83; 84). Thereupon, the premises considered, it was agreed between the Federal Public Housing Administration officials and defendant's president that defendant would furnish water to the housing project through the master meters, but that the rates were to apply to the individual dwelling units; that is, it was agreed between the parties that each unit was to be furnished on the basis of the existing tariff, all "as if" the individual meters had been installed (T.R. 83-84).

The agreement was entirely oral and was never reduced to writing. However, pursuant to the foregoing oral agreement, defendant commenced to supply water to the housing

project in May, 1944, and continued to supply water thereto for many years (T.R. 84).

Subsequent to May of 1944, and from time to time, defendant rendered its statements or billings for the water delivered by it to the housing project. In each case the billing was rendered by computing charges in the manner agreed upon in the oral agreement of 1944, to wit: as though there were a separate meter at each of the 120 units in the project (T.R. 3-6; 6-8; 36-39). In each case these billings were promptly paid by plaintiff, with the sole exception of the amounts billed for June and July, 1951 (T.R. 36-39). No objection was raised to any of such billings between commencement of service and June 12, 1951 (T.R. 54-55).

In 1952, by formal complaint brought before the Arizona Corporation Commission, plaintiff sought to recover alleged overcharges (T.R. 55). This relief was denied by decision of the Arizona Corporation Commission, dated December 20, 1952 (Defendant's Exhibit A in evidence), upon the ground that the matter before the Commission involved a contest "between private litigants" and therefore the Commission lacked jurisdiction to determine the matter (T.R. 56-57).

B. The Present Litigation.

In 1956 plaintiff commenced the present action, alleging a contract with defendant "at the rates specified by the published tariff", and alleging an "overcharge" of \$15,824.33 (T.R. 3-6). This figure was arrived at upon the premise that the billings rendered to and paid by plaintiff were erroneous in that "defendant made its charges as though there were a separate meter at each of the 120 housing units in the project" (T.R. 3-6; 37-38).

Defendant answered plaintiff's Complaint by admitting that a contract had been entered into and by admitting that

its charges were made as though there were separate meters at each of the units, but denying any overcharge whatever (T.R. 6-7). The Answer further affirmatively alleged the following matters :

1) The oral agreement between the parties, to the effect that due to the unavailability of separate meters charges would be made "as if" there were separate meters, notwithstanding their physical absence (T.R. 7) ; and

2) That plaintiff accepted the billings and paid the same (T.R. 8).

It is to be noted that plaintiff's Complaint on file herein affirmatively establishes by its own allegations that plaintiff paid the money sought to be recovered in this action voluntarily, under claim of right in the defendant, and with full knowledge of all of the facts (T.R. 3-6).⁶ The Complaint was therefore attacked by defendant's Motion to Dismiss for failure to state a claim upon which relief could be granted, upon the ground that the Complaint stated facts precluding recovery under substantive rules of law which provide that money voluntarily paid under claim of right with full knowledge of the facts cannot be recovered back (T.R. 17-20).

Trial of the action brought out the facts as recited hereinabove under the heading "Background of the Action", together with undisputed testimony establishing that so far as the defendant was concerned, it was its uniform policy to make billings for the number of units served in cases where a multiple unit dwelling was served through a master meter (T.R. 66).

The Court made Findings of Fact and Conclusions of Law (T.R. 13-16; 32) and entered judgment for the defend-

6. For the convenience of the Court, the complete text of the Complaint has been set forth as an appendix at the close of this brief.

ant (T.R. 16; 32). Defendant's several after-judgment motions were denied (T.R. 33) and this appeal followed (T.R. 33).

For the sake of consistence, the parties will be referred to herein as designated below, i.e. as "Plaintiff" and "Defendant".

THE ISSUES INVOLVED

This Appeal presents three issues, the resolution of any one of which in favor of defendant would appear to call for reversal under instruction to enter judgment for defendant. Inasmuch as the evidence is without conflict, the only question is of the legal effect of the facts brought out by the evidence; therefore the issues, in final analysis, present only questions of law.

ISSUE NO. 1

Was the defendant, in the performance of these services to plaintiff, acting as a public utility and therefore bound by its tariff rates on file with the Arizona Corporation Commission; or was it acting in a private capacity and thus free from all such regulation?

ISSUE NO. 2

If defendant was, in fact, acting as a public utility, was there, as a matter of fact or a matter of law, any variance between the filed rate and the rate actually charged; or was the contract between the parties really a device employed by them to conform the charged rates to the filed rates, with the result that there was no variance whatever?

ISSUE NO. 3

Under the circumstances of this case, can the plaintiff, having voluntarily paid certain sums of money to defendant, under claim of right and with full knowledge of all the facts, now recover back such payment, contrary to substantive rules of Arizona law?

SPECIFICATIONS OF ERROR

I. Specification of Error No. 1 (Issue No. 1).

The District Court erred in making the following Findings of Fact and Conclusions of Law, respecting the capacity in which defendant performed the contract between itself and plaintiff:

a) Finding of Fact No. 3 (T.R. 13):

“3. That the defendant is a corporation doing business *as a public utility* at Kingman, Arizona;” (Emphasis supplied);

b) Finding of Fact No. 7, as amended (T.R. 32):

“7. That from May 20, 1944, to July, 1951, the defendant, *in its capacity as a public utility*, delivered water to the said Vista Solona Housing project through four meters * * *;” (Emphasis supplied);

The foregoing Findings of Fact are erroneous in that the undisputed evidence in this cause established that in delivering water through the master meters and not through individual meters, in performance of its contract with the plaintiff, defendant, as a matter of law, was doing what it was not under a duty to do except for such contract, which circumstance, under the laws of the State of Arizona, made such service a private activity, as to which private activity defendant was not acting as a public utility.

c) Conclusion of Law No. 3 (T.R. 15):

“3. Any agreement between plaintiff and defendant for water service at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void;”

The foregoing Conclusion of Law is erroneous in that defendant, in the performance of its contract with plaintiff, was not acting as a public utility but in a private capacity, and therefore all regulations bearing upon its activities as

a public utility were inapplicable to the performance of this contract in its private capacity.

II. Specification of Error No. II (Issue No. 2).

The District Court erred in making the following Findings of Fact and Conclusions of Law respecting variance between the filed rate and the rate actually paid:

a) Finding of Fact No. 8 (T.R. 14):

“8. That as a result of this billing practice⁷ *defendant overcharged the plaintiff* a total of \$15,824.33 * * *,” (Emphasis supplied);

The foregoing Finding of Fact is erroneous in that the undisputed evidence indicates that the usual and contemplated billing practice, (i.e. by charging per individual meters) was not and could not be utilized solely because such individual meters were not available, and that service to the housing units was therefore established and billings agreed to be made “as if” individual meters had been utilized, all in order to conform the charges paid by plaintiff to the charges then being paid by any of defendant’s customers. This conformance was accomplished through the contract entered into between the parties, as a result of which plaintiff paid no more than any other user, from which it follows that there was no overcharge whatever.

b) Conclusion of Law No. 3 (T.R. 15):

“3. Any agreement between plaintiff and defendant for water service at a rate *different from* that filed by the defendant with the Arizona Corpora-

7. The “billing practice” referred to is set out in Finding of Fact No. 7, as follows:

“7. * * *; and the quantities of water so delivered were reported and billed for each monthly period solely on the basis of amounts appearing on said meters; but defendant made its charges as though there were a separate meter at each of the 120 units;” (T.R. 14; 32)

tion Commission would be void;" (Emphasis supplied);

The foregoing Conclusion of Law is erroneous because there is implicit in it the finding that the agreed rate was, in fact, "different from" the filed rate, which implicit finding is contrary to the undisputed evidence, which said evidence demonstrated that said contract conformed the rate to be charged to the filed rate and did not differ therefrom at all.

c) Conclusion of Law No. 4 (T.R. 15):

"4. Any ambiguity in the filed rate, Plaintiff's Exhibit No. 1, must be resolved against defendant since such rate was prepared by the defendant and submitted by defendant to the Corporation Commission for approval; so construed, the rate does not permit the charge of a monthly \$2.50 minimum per residence unit";

The foregoing Conclusion of Law is erroneous on two separate grounds: first, in applying the rule of construction deferred to therein, in that such application fails to take the reason for the rule, as well as cogent surrounding circumstances, into consideration, to wit: that individual meters had been contemplated; that the sole reason that individual meters were not used was due to wartime shortages; that except for such shortages individual meters would have been used; that the "presence" of individual meters for billing purposes was supplied by agreement in absence of their physical existence; that plaintiff had full knowledge of each of these facts; and that under these circumstances the filed rate not only permitted but required a minimum rate of \$2.50 per residence unit. Second, said Conclusion of Law is contrary to law, in that law requires that minimum charges be made on a "per consumer" and not a "per meter" basis.

d) Conclusion of Law No. 6 (T.R. 15)

“6. Plaintiff was *overcharged* in the sum of \$15,824.33 * * *;” (Emphasis supplied).

The foregoing Conclusion of Law is erroneous upon all of the grounds and all of the reasons set forth in subdivisions a), b) and c) of this section, inasmuch as the foregoing Conclusion of Law follows as a conclusion of the errors committed in the Findings of Fact and Conclusions of Law set forth in said subdivisions a), b) and c).

III. Specification of Error No. III (Issue No. 3).

The District Court erred in denying and failing to grant defendant's Motion to Dismiss (T.R. 17), upon the ground and for the reason that plaintiff's Complaint failed to state a claim against defendant upon which relief could be granted, in that said Complaint affirmatively established that plaintiff had voluntarily paid the sum sought to be recovered under claim of right and with full knowledge of the facts.

IV. Specification of Error No. IV (General Issue).

The District Court erred in entering Judgment for plaintiff upon each of the grounds and for each of the reasons hereinabove specified under Specifications of Error I, II and III as the same pertain to Issues 1, 2 and 3.

SUMMARY OF ARGUMENT

I. (Issue No. 1).

It is conceded that defendant, as to its general activities, was a public utility. However, under Arizona law, a public utility may also have private activities. Under Arizona law a private activity arises in any case where a public utility

agrees, under contract, to do what it would not be under a duty to do except for such a contract, and such a situation is governed by rules applicable to private contracts in general and not by regulatory statutes. In this case, plaintiff, by tendering the 1944 contract to defendant, requested service through master meters. The law is well established that a public utility may lawfully refuse to serve a multiple unit dwelling through master meters, and it is undisputed that defendant did refuse to serve. It is therefore clear that defendant was under no duty to render the service which it performed and its performance therefore was a private activity, pursuant to its contract with plaintiff, and as such was an activity not at all governed by any of the regulatory statutes of the State of Arizona, or by its tariff rate on file with the Arizona Corporation Commission.

II. (Issue No. 2).

Even assuming that the activities of defendant in this case were those of a public utility, as such, which defendant denies, the undisputed evidence establishes that the tariff, promulgated in the year 1919, contemplated that each dwelling unit have an individual meter, and that individual meters had been contemplated for the plaintiff's housing project. Defendant's tariff on file with the Corporation Commission both authorized and required it to receive a \$2.50 minimum charge for each such connection. However, under the particular conditions of World War II, which created severe shortages of materials, individual meters were not available from any source, and it was necessary to construct the project without such individual meters, and by using four "master meters" in lieu thereof. Therefore, in view of the fact that apart from the particular wartime circumstances, individual meters would have been used and

defendant would have been entitled to the minimum charges resulting therefrom, it was agreed that billings for water consumed would be made "as if" individual meters were actually in place; that is to say, the parties hereto employed the contract between themselves as a "fiction" to supply by agreement what was absent in fact, and the result of such fiction was merely to conform the charges made to plaintiff to the charges currently being paid by all other consumers in the community. The end result of this arrangement was therefore one of strict conformance to the filed rates, and in no wise constituted a variance therefrom; moreover, even apart from the factual background of this case, the District Court's Conclusion of Law that the filed rate did not permit a monthly minimum charge "per unit" is contrary to law, in that, in law, a minimum charge is not against the meter, but against the consumer.

III. (Issue No. 3).

It is the well-established law of the State of Arizona that where a party voluntarily makes payment of money to another, under claim of right to said payment, and where the party making the payment has full knowledge of all of the facts, that said payments may not be recovered. Plaintiff's Complaint affirmatively establishes that the payments herein were made voluntarily and under claim of right and with full knowledge of the facts; therefore, plaintiff is precluded by Arizona law from recovering any such payments. The rule applies fully to public utilities and to the United States as a paying party.

ARGUMENT

I. (Issue No. 1).

It was pleaded in plaintiff's Complaint that defendant was an Arizona public utility (T.R. 3). This fact was

admitted in defendant's Answer (T.R. 6). This allegation was pleaded and employed by plaintiff in support of its theory that if defendant was a public utility, then, *ipso facto*, it was bound by regulatory statutes of the State of Arizona bearing upon public utilities. The statutes referred to hereinabove are found in Arizona Revised Statutes, and provide as follows:

"Sec. 40-367, Change of Rates; Notice; Filing; Exception.

- A. No change shall be made by any public service corporation in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, except after thirty days' notice to the Commission and to the public as provided in this chapter.
- B. Notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change to be made in the schedules then in force, and the time when the change will come into effect.
- C. The Commission, for good cause shown, may allow changes without requiring the thirty days' notice provided for in this section, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published.
- D. When any change is proposed, attention shall be directed to the charge on the schedule filed with the Commission by some mark, designated by the Commission, immediately preceding or following the item."

"Sec. 40-374, Prohibition of Rebates and Agreements.

Except as otherwise provided in this chapter, no public service corporation shall charge, demand,

collect or receive a greater, less or different compensation for transportation of persons or property, or for any product or commodity, or for any service rendered in connection therewith, than the rates, fares, tolls, rentals and charges applicable to such transportation or product, commodity or service specified in its schedule on file and in effect at the time, nor shall any public service corporation refund or remit, directly or indirectly, in any manner or by any device, any part of the rates, fares, tolls, rentals, and charges so specified, nor extend to any person any form of contract, agreement or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons and except under order of the Commission."

As the whole transcript of record discloses, it was plaintiff's theory throughout the progress of this action that inasmuch as defendant was a public utility it was bound by the above statutes designed to regulate public utilities, and that therefore defendant's contract with plaintiff, which contract plaintiff contends is "different from" defendant's filed rate, was void under and by virtue of the foregoing statutes. The manner in which this "difference" was manifested will be pointed out in the next section of this argument. However, for purpose of the argument hereunder, whether or not there was any actual difference is immaterial, for the issue raised here is whether or not the filed rate had any bearing whatever upon the question presented to the Court.

This issue depends wholly upon the determination of another issue, to wit: Was the defendant in this particular

activity acting as a public utility, as such?⁸ It is at this point that the whole evidence demonstrated unequivocally and without dispute that defendant was not acting as a public utility in this particular operation.

It is noted, as pointed out above, that plaintiff alleged and defendant admitted that defendant was an Arizona public utility. The allegation and the admission however, referred only to the general status of defendant and it has been defendant's position throughout that, while admitting that defendant was a public utility, generally speaking, it was not acting as a public utility in the making and performance of the contract presently in issue, but in that respect was engaged in a private activity in its private capacity; see, for example, defendant's Supplement to

8. To the effect that the issue last stated is the primary issue, see the language of the Supreme Court of Washington in *Sunset Shingle Co. v. Northwest Electric & Water Works*, 118 Wash. 416, 203 P. 978, to wit: "We may concede for present purposes that respondent is, generally speaking, a public service corporation; that is, that its principal business is rendering public service to the City of Montesano, and the inhabitants thereof, in furnishing electric energy for light, and that as to such service, it is subject to the regulatory provisions of our public service statutes as to uniformity of rates charged and quality of service rendered. *But it does not follow that every act and thing done by respondent, even though it be in a sense service rendered to a person or corporation in compliance with the terms of some contract made by it with such person or corporation, is a public service, subject to the regulatory provisions of our public service statutes.* In controversies such as this, the question is not so much as to whether or not the corporation is a public service corporation—a general term often of very loose application when discussing public service problems—but whether or not *the service in question* is a public service. Manifestly our public service statutes and the administration of them have to do only with public service rendered by corporations engaged therein. *Therefore, let us not be led astray by the fact that respondent is, generally speaking, a public service corporation, but direct our inquiry to the question of whether or not the service here in question, agreed to be rendered to appellant by respondent, is a public service.* If it is not, then plainly the contract in question does not fail of its binding force upon respondent because of the provisions of our public service statutes." (Emphasis supplied.)

Motion to Amend Findings of Fact and Conclusions of Law, Paragraph 6 thereof.⁹

It is well established under Arizona law that the fact that an enterprise or business may be a public utility, generally speaking, does not render all of its activities public activities. Rather, it is well established that a particular enterprise can carry on varied activities, some public in nature and some private in nature. As stated in *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210:¹⁰

9. Paragraph 6 referred to above requested the Court below to amend Finding of Fact No. 3 to read: "That the defendant is a corporation doing business as a public utility at Kingman, Arizona; *that, however, in the making and performance of the contract here in issue, said defendant was not dealing as a public utility, as such, but was dealing in a private capacity under private contract to perform what it was not under a duty to perform without said contract.*" (T.R. 28-29)

10. The facts of this case are briefly as follows: The City of Phoenix, a municipal corporation, operated a water system and was providing water service to certain users outside the city limits. Kasun, petitioner, was among such users. Respondent city proposed to increase the rates for these services and Kasun sought an injunction enjoining such increase upon the ground that the proposed rates were unreasonable. The city answered Kasun's complaint by alleging that the service rendered by the city was not one of public duty but of voluntary contract. Appeal was taken upon the above ground from an order granting petitioner the injunction prayed. The Arizona Supreme Court held that the distinguishing characteristic of a public utility is the devotion of private property to such a use that the public has a right to demand service with reasonable efficiency and under proper charges, and that this raised a duty to serve by implication of law, and that this legal duty was the basis of the right of public authorities to control the rates to be charged. However, the Supreme Court also held that not every activity is a public service, but that a public utility may act in a private capacity subject to the same rules as any private contracting party. It further laid down the rule that whether a particular function is a "public service" or a "private activity" depends upon whether the legal duty to serve is present without contract, and that if the same is not present, then the right to be served can be based only upon contract, which contract "is subject to review by the Courts only in the same manner as any other private contract". The case then discusses the particular facts and circumstances present in the case and concludes that the city had no obligation, as a matter of law, to furnish service to Kasun and Kasun's only right

“But the fact that a business or enterprise is, generally speaking, a public utility, does not make every service performed or rendered by it a public service, *but they may act in a private capacity*, and in so doing are subject to the same rules as any other private person so acting.” (Emphasis supplied.)

Therefore, in this case the defendant, although a public utility, generally speaking, need not necessarily have been considered as having acted as such. Rather than that, Arizona law firmly establishes that the defendant, as a public utility, was perfectly able to “act in a private capacity”, and in that capacity to be “subject to the same rules as any other person so acting”, provided only that a situation proper to the exercise of that ability was presented to the defendant.

It is therefore necessary to examine the facts bearing upon the contract in issue to learn whether its performance constituted a “public service” or activities in a “private capacity”. However, to give effect to these facts, it is necessary to see what test is applied under Arizona law to determine whether a particular activity falls within the class of “public service” on the one hand, or that of “private capacity” on the other. This test has been clearly stated in *City of Phoenix v. Kasun*, *supra*, where the Arizona Supreme Court said:

to such service depended upon his contract with the city, which, under the rules stated above, could not be reviewed by the Court except under the rules “applying to private contracts in general”. The judgment of the lower Court was therefore reversed with instructions to vacate the injunction and dismiss Kasun’s complaint. The rule of the *Kasun* case is not confined to Arizona; see 73 C.J.S. Public Utilities, Sec. 9, P. 1003, and cases cited, and 51 C.J., Public Utilities, Sec. 19, P. 8, and cases cited, for cases from other jurisdictions; because of the state of the governing law, enunciated in the *Kasun* case, we do not deem it necessary to burden the Court with other authorities.

“Since the basis of the right of regulation is that a duty is owed the public, regardless of a contract, it follows as a corollary that *when the duty which arises is based purely upon contract and not on law, express or implied, the situation is governed by the rules applying to private contracts in general*, notwithstanding that one of the parties may be operating a public utility”. (Emphasis supplied.)

Briefly analyzed, the above rule of law declares simply that the nature of a particular activity is to be determined, not by any rule of thumb, but by the acts which are done under the particular circumstances presented, as to which Arizona law declares that if the service rendered is rendered under a duty which the enterprise had, even without a contract, then the service rendered is a “public service”, but if the service is rendered not as a result of such legally imposed duty, but as the result of a contract, without which no duty would exist, then the activity is a “private activity”.

Therefore, the *Kasun* case clearly establishes two points: 1) That defendant, although a public utility, generally speaking, was free to engage in private activities; and 2) That whether or not its particular activity in this case constituted a public service on the one hand or a private activity on the other, depends wholly upon whether or not it had a duty to act as it did, without any contract requiring such action, under the particular circumstances presented herein.

Now to the facts: It is established by the record that when plaintiff undertook construction of the subject housing project it had been contemplated that each of its 120 units would be serviced by an individual meter. Negotiations with defendant were therefore conducted upon this basis. However, when the project passed from the planning stages to actual construction, it was discovered by both parties

that the contemplated individual meters were not and would not be available due to wartime shortages brought about by World War II. Thereupon, plaintiff conformed its construction plans to the material-supply situation, and the project was constructed so as to supply the entire 120 units through four "master meters". Thereafter plaintiff tendered to defendant a certain written contract (Plaintiff's Exhibit 2 in evidence)¹¹ embodying provisions whereby defendant would provide water services through "a master meter or meters" (See Paragraph 5, Plaintiff's Exhibit 2 in evidence), and whereby "the readings of all such master meters will be totalized and considered as one for the purpose of rates and billing * * *". (See Paragraph 6, Plaintiff's Exhibit 2 in evidence.) We believe that it cannot and will not be contested that this written contract amounted in law to a request by plaintiff, as a customer, to defendant, as a public utility, to render services upon the terms embodied in said contract, to wit: to render service through "master meters".

Nor is there any dispute whatever that defendant refused to render service upon the terms proposed by plaintiff. Defendant's refusal is of record herein, evidenced by a letter from defendant's then counsel to plaintiff (T.R. 53-54), advising plaintiff that "the proposed agreement is not satisfactory". The letter further requested plaintiff to send its representatives to discuss the situation. Thereafter such representatives did meet with defendant's president, as a result of which an oral agreement was arrived at, the substance of which was that defendant would provide water service through the master meters and upon the terms proposed in the written contract theretofore tendered by plaintiff, provided however, that the terms proposed by said written contract be modified so as to provide that

11. This exhibit was not printed in the Transcript of Record. It is set out in full in the appendix at the close of this brief.

billings for water so provided would be made "as if" there were an individual meter at each unit. Thereafter and upon the basis of this oral agreement, defendant did provide water service and deliver water through the master meters.

Now: Arizona law, as set down above, provides that if what was done by defendant—i.e. providing water service, under these circumstances, through master meters—if this was done pursuant to a duty which existed *without* the contract, then the service rendered would be a "public service" and defendant would be acting as a public utility and governable as such; however, the law also specifically provides that if there was *no duty* to do what was done *apart from such contract*, then the service rendered would be a "private activity", free from all regulation bearing upon public utilities and "governed by the rules applying to private contracts in general"; *City of Phoenix v. Kasun, supra*.

The question then is strictly this: Was defendant herein, apart from its oral contract with plaintiff, under a duty to render service to 120 separate dwelling units through the plaintiff's master meters and to make charges solely upon the basis of the amounts of water delivered through the master meters? In that regard, the law is quite clear, not only that defendant did not have such a duty, but that defendant was lawfully entitled to refuse to render such service. Moreover, as the evidence shows, defendant did, in fact, refuse to render such service and conceded to render such service only upon the condition that billings would be made "as if" the conditions upon which defendant could lawfully insist did exist in fact.

To point out defendant's lack of duty in this regard, it is necessary to analyze precisely what it was that defendant was requested to do. The conditions under which the plain-

tiff proposed that defendant should serve and under which defendant finally did serve (provided however, that billings be made "as if" there were 120 individual meters) were somewhat unusual. The proposed agreement between the parties specifically provided that after the water passed the "point of delivery" (i.e. a designated master meter), the water would cease to be the property of defendant and would become the property of plaintiff (see Paragraph 18 of plaintiff's Exhibit No. 2). The agreement further provided that plaintiff would own and operate the entire "secondary water distribution system" of the housing project (see Paragraph 14 of plaintiff's Exhibit No. 2), and specifically provided "that the government may sell or otherwise distribute water to the tenants as an incident of tenancy", (see Paragraph 15 of plaintiff's Exhibit No. 2). The situation was therefore one in which the plaintiff, as "landlord" of 120 individual tenants, proposed to buy water outright from the defendant (by purchase of the same through a single master meter, and by payment of a single minimum charge) and thence, as owner of the water, to redistribute and resell it to the 120 individual tenants.

On this point the law is quite clear: a public utility is under no duty whatever to provide service under such circumstances; and the law is equally clear that a public utility may lawfully refuse to render service under such circumstances: *Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners*, 106 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352; *Lewis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 Fed. 2d 701; *Moebis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 Fed. 2d 703 (no opinion; this case follows *Lewis v. Potomac Electric Power Co.*, *supra*, which was dispositive); *Florida*

Power and Light Co. v. State of Florida ex. rel. Malcolm, 107 Fla. 317, 144 So. 657; *Karrick v. Potomac Electric* (Supreme Court, District of Columbia), P.U.R. 1932 C, 40.

The foregoing cases each meet substantially the same question and reach substantially the same result, although the reasons supporting the several decisions differ in certain particulars, which shall hereinafter be pointed out. However, despite the fact that each of said cases depends upon its particular facts, just as the instant case must be governed by the facts peculiar to itself, it is submitted that the facts in the foregoing cases, in each case, are so far similar to those of the instant case as to make the rules of law therein laid down wholly applicable, particularly in view of the pronouncements of the Arizona Supreme Court in *City of Phoenix v. Kasun*, *supra*, stressing the duty element of a public utility as the keystone of the dividing line between the right of public authority to regulate and the right of the enterprise to engage in private contract.

Under the rule of *City of Phoenix v. Kasun*, *supra*, it is apparent that a duty without any independent contract raising such a duty is essential to stamp defendant as a public utility. The question of whether such a legal duty existed herein can be settled by analysis of the proposition of whether or not defendant could have been compelled to serve upon the terms originally proposed by defendant. It is largely in this manner that the foregoing cases met and decided the above question, and the question will therefore be accorded similar treatment herein.

In the case of *Sixty-seven South Munn, Inc. v. Board of Utility Commissioners*, *supra*, petitioner, which was the owner of an apartment house, brought certiorari to review an order of the Public Utility Board refusing to compel

the electric and gas company to deliver electricity to petitioner at its apartment house through a master meter, the commodity then to be redistributed and resold by petitioner, through its agent, to the individual tenants. The issue, as stated by the Supreme Court of New Jersey, was whether the electric and gas company would be compelled, contrary to its policy, to sell to petitioner on this basis. The contention of the petitioner was that it was "entitled as of right to be supplied at its master meter with electricity at wholesale rates, which electricity it may then redistribute and resell to its tenants", and the answer to this contention was declared by the New Jersey Supreme Court to resolve the entire controversy. In denying petitioner's contention, the Court declared that both the rights of the company and the rights of the public were to be considered. Regarding the company, it was seen that "a very real competition" might result if the utility should be compelled to submit to the practice, for each square block might then be placed in similar operation, resulting in competition with the utility "for sales and delivery to the various users within the block". As to the public, the Court cited the duty of the electric and gas company, as well as the respondent board, to avoid discriminatory practices, but explicitly decided that they could find nothing discriminatory in the refusal of the company to render the requested service provided such practice was uniform. The Court concluded that such refusal in all aspects was "quite within its lawful discretion".

So stated, the *Munn* case reduces itself to two propositions: 1) A utility, to avoid creating competition with itself, may refuse to serve through master meters where such service is destined for redistribution to a number of tenants, and 2) Such refusal is based not only upon the right of the

utility to protect its revenues, but upon the public interest which is inherent of all the affairs of a public utility, to wit: Non-discrimination between ultimate users. We note with interest that certiorari was denied in the United States Supreme Court.

So viewed, it is impossible, with reason, to distinguish the *Munn* case factually from the instant case, for it is undisputed that plaintiff requested water service through master meters for resale through a secondary water distribution system to individual tenants, (Plaintiff's Exhibit No. 2 in evidence), and that defendant declined to do so. So far as "uniform policy" may be concerned, it is further undisputed that during the period of time which was material herein, defendant billed other consumers upon exactly the same basis as that of which plaintiff now complains, to wit (T.R. 66):

"Q. Directing your attention to the years 1944 up to July of 1951, Mr. George, did the Kingman Water Company bill other residential services in Kingman, Arizona, on the same basis?

A. Yes.

Q. Now, with respect to services to multi-family units other than the Vista Solana project, did you have any such services during that period?

A. A few small ones.

Q. Can you give me an example of one?

A. Well, let's see. We could take the Windsor Apartments, for one. That is four apartments.

Q. How many meters did the Windsor Apartments contain?

A. One meter."

Therefore, it is seen that so far as material features are concerned, the instant case is wholly in point with the *Munn* case. It follows that the result of the instant case must be the same, to wit: that as a matter of law defendant herein

was not compellable to render the service which it agreed to render pursuant to its contract with plaintiff, due to the fact that it had no legal duty to render the same, without said contract, from which it follows that in doing what it did, it was acting in a private capacity and not as a public utility. *City of Phoenix v. Kasun, supra.*

The case of *Lewis v. Potomac Electric Power Company, supra*, and the related case of *Moebs v. Potomac Electric Power Co., supra*, both present substantially the same facts and reach substantially the same conclusion, but add increased stress to the right of the utility to protect its revenues. For example, in the *Lewis* case, the power company involved had been selling current to the owner of a store and apartment building, which the owner then redistributed and resold to the individual tenants. The power company, by notice to the owner, declined to furnish further current upon that basis and threatened to discontinue the service. It was the power company's plan to collect from each tenant upon the retail rate basis currently being charged other similar users. The issue, as stated by the Court of Appeals for the District of Columbia, was: "The question which we have to decide is whether the power company may adopt a rule not to furnish electric current to a property owner unless the latter will agree not to re-meter and resell the current to his tenants". The Court held that the utility lawfully could make such a rule, and that under purview of such rule could lawfully refuse to render such service. The Court declared that the reasons for the rule were obvious, in that "it secures equality of rates and of service and prevents rebates and discrimination", and declared further that it was "reasonable protection to the revenue of the company, and this it had a right to do".

Again, it is seen in the *Lewis* and *Moeb* cases that the rules laid down in the *Munn* case, *supra*, are followed by the Court of Appeals for the District of Columbia, and that the duty to prevent discrimination and the right to protect revenue are asserted. Such being the case, the result in the instant case, which presents no material factual departures, must be the same.

A similar factual situation is presented in a slightly different light in the case of *Florida Power and Light Company v. State of Florida ex. rel. Malcolm*, *supra*. In that case the power company was providing service to individual tenants through individual meters. The plaintiff brought mandamus to compel the power company to remove the individual meters and to install master meters in lieu thereof, from which the plaintiff planned to redistribute and resell the current, as the plaintiff saw fit. It was held by the Supreme Court of Florida that mandamus would not lie because the company was not compellable to render service upon the basis proposed by the plaintiff. In so holding, the Court said "It is entirely lawful and reasonable, in the absence of valid statute or franchise obligation to the contrary, for a public utility company to refuse to extend its service to one who proposes to resell it in competition with it".

While it might be conceded in the instant case that the loss of revenue resulting from the sale through master meters to the plaintiff would have been relatively limited in scope, yet it cannot be denied that the direct result would have been (and, in fact, will be if plaintiff prevails herein) the depriving of defendant of the 120 individual service charges which it was entitled to make to the 120 individual ultimate consumers. It is therefore submitted that the question of competition and of protection of revenues is clear

cut; see, for example, *Karrick v. Potomac Electric Power Company, supra*, in which the facts were substantially the same as in each of the above cases, and where the Court said:

“* * * to permit *any device* whereby electric current is not sold by the defendant to the ultimate consumer at rates which are under governmental regulation and just and reasonable, but does permit electric current to be sold to a middle man at rates which may or may not apply to the ultimate consumer, *will affect the net revenues of the defendant and be against public interest and public policy.*” (Emphasis supplied.)

It thus appears upon the undisputed facts herein and upon the law, set out above, that the following occurred in this case: Individual meters had been contemplated for use in the subject housing project, but they were not available; therefore it was necessary to employ “master meters” in lieu thereof; that plaintiff thereupon requested defendant to provide service through the master meters under conditions which provided that thereupon plaintiff could redistribute and resell the water so delivered to it; that defendant specifically refused to serve under such circumstances; that defendant’s refusal was wholly lawful for the reason that it had no duty to provide service under such circumstances; that thereupon defendant, by express contract, agreed to do what it was not otherwise under a duty to do by insisting that charges be made “as if” meters were there.

From this it follows, under the law laid down under the rules of *City of Phoenix v. Kasun, supra*, that “the situation is governed by the rules applying to private contracts in general” and “subject to the same rules as any other private person so acting”, which rules we respectfully submit did not include regulation of rates by the Arizona Corporation Commission, for it is axiomatic that only the public

activities of a public utility are so governable and that "the rules applying to private contracts in general" are wholly without the sphere of regulatory statutes bearing upon the activities of public utilities as such.¹² It is therefore clear beyond all doubt that in this case defendant was acting in a private capacity and was not subject to the regulatory statutes or the tariff rate upon which plaintiff's case below was predicated. It follows that Issue No. 1 stated above must be resolved in favor of defendant and the judgment of the Court below reversed for the reason that, in addition to the errors of law pointed out above, the judgment, as the same presently stands, compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public utilities acting as such, and that as such, the judgment thereby contravenes the Fifth Amendment to the Constitution of the United States of America in that it deprives defendant of its property without due process of law and constitutes the taking of private property for public use without just compensation.

We respectfully submit that, in the premises, the District Court's Findings of Fact Nos. 3 and 7, which purport to fix defendant's capacity as a public utility, are unsupported by and contrary to the law and the evidence adduced upon this cause, and that its Conclusion of Law No. 3, to the effect that any agreement between the parties at a rate different from that filed with the Arizona Corporation Commission would be void, is contrary to law for the reason that upon the undisputed evidence, and as a matter of law, defendant was in no wise bound by the rate on file with the Corporation Commission, nor was it bound by any regulatory stat-

12. The rule is so stated in *Sunset Shingle Co. v. Northwest Elec. & Water Works*, 118 Wash. 416, 203 P. 978, quoted *supra*, footnote 8, p. 17, this brief; identical rule is also implicit in *City of Phoenix v. Kasun*, *supra*.

utes of the State of Arizona bearing upon the activities of public utilities.

It is well to note at this point that the conclusion herein advanced is the precise conclusion reached by the Arizona Corporation Commission when this same case was brought before that body in 1952. As hereinabove noted (Statement of the Case) the Corporation Commission, by decision handed down December 20, 1952 (Defendant's Exhibit A in evidence: T.R. 56-57) declared that it lacked jurisdiction of this precise controversy upon the ground that it involved a contest "between *private* litigants". We respectfully submit that the facts and the law admit of no other conclusion.

II. (Issue No. 2).

The second issue involved herein is: assuming, *arguendo*, that defendant was acting as a public utility in the making and performance of the contract here in issue, which defendant denies, was there, in fact or in law, any true variance between the rates charged and paid by plaintiff and those on file with the Corporation Commission? We assert that there was not.

A. VARIANCE AS A MATTER OF FACT.

Such variance, if any, is to be found between the facts as they occurred and the language of "Tariff No. 1" (plaintiff's Exhibit No. 1 in evidence; T.R. 40-41). In that regard it will be recalled that defendant's tariff rate provided as follows: "All connections metered * * * \$2.50 minimum rate of 3000 gallons". The question, then, was one of construction, to determine what the tariff allowed by determining what it meant.

In that regard, plaintiff has adopted the position that since the tariff provides "all connections metered" the mini-

imum rate" could apply only on a "per meter" basis.¹³ In other words, the Government has contended that the stress is to be laid on the number of meters in use rather than the number of units or consumers served. Reduced to its final analysis, the Government's contention is that in order to justify minimum charges for each of the 120 units there would have to have been an actual physical meter at each of the 120 units. In support of this contention plaintiff has argued and the lower Court has found: (see Conclusion of Law No. 4) that "any ambiguity (i.e. whether a "per meter" or a "per unit" basis was to be followed) in the filed rate must be resolved against defendant, since such rate was prepared by defendant and submitted by defendant to the Corporation Commission for approval; so construed, the rate does not permit the charge of a monthly \$2.50 minimum per residence unit" (T.R. 15).

The foregoing conclusion supporting plaintiff's position that the tariff must be construed against defendant upon the ground that it was prepared by defendant is a well known rule of construction in Arizona (see cases, *infra*). However, it is our position, and we respectfully submit, that the application of the above rule of construction in this case is and has been wholly erroneous.

As mentioned above, it is conceded to be the established rule of construction in Arizona that an ambiguous writing is to be construed most strongly against the party who prepared it; see, for example, *Gardner v. Trigg*, 59 Ariz. 377, 129 P.2d 666; *Covington v. Basich Bros. Construction Co.*, 72 Ariz. 280, 233 P.2d 837; *Central Housing Investment Corp. v. Federal Nat. Mortgage Ass'n*, 74 Ariz. 308, 248

13. Plaintiff's premise itself (i.e. that the number of meters, rather than the number of consumers, governs) is contrary to law, apart from any question of construction; this is hereinafter more fully developed; see "B. Variance as a Matter of Law", this section.

P.2d 866. These cases establish a “rule of strict construction”, as the rule has been referred to in a subsequent Arizona case (see *infra*), which rule has been applied with full force in this case. However, the rule as laid down by the above cases does not accurately represent the present state of the law in Arizona, for in a later case, *Hamberlin v. Townsend*, 76 Ariz. 191, 261 P.2d 1003, the rule of the foregoing cases has been elaborately discussed and extensively qualified, and, as will be seen, the *Hamberlin* case, *supra*, indicates without doubt that this “rule of strict construction” has found misapplication herein in having been applied in its raw and unqualified state to this defendant. The misapplication spoken of is found in two separate areas.

First, there is a largely technical misapplication, which is none the less material. In the *Hamberlin* case, *supra*, the plaintiff sought to apply the “rule of strict construction” upon the ground that defendant therein had prepared the writing. In discussing this contention, the Supreme Court of Arizona quoted with approval from 17 C.J.S. Contracts, Sec. 324, and said:

“Where a contract is ambiguous, it will be construed most strongly against the party preparing it or employing the words concerned which doubt arises, the *reason for the rule* being that a man is responsible for ambiguities in his own expressions and *has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adapt a construction by which they would mean another thing*, more to his advantage; * * *” (Emphasis supplied.)

Thus, as stated by the Arizona Supreme Court, the reason for the rule is based upon the fact that the party preparing a writing has no right to mislead the other party or to induce the other party to act to his prejudice. It is axiomatic

in the law that where the reason for a rule fails, the rule fails with it, for there is neither logic nor justice in applying a rule which has no reason to support it. If this is true, then the "rule of strict construction" applied herein must totally fail for it is undisputed upon all the evidence that plaintiff knew at all times, and had been so informed by defendant, that defendant looked upon the tariff as authorizing and requiring a minimum charge "per unit", that defendant intended to make its charges accordingly, and that plaintiff agreed to pay charges in accordance therewith. It therefore appears that there was no "misleading" or "inducing" by reason of "ambiguous language" in the tariff—rather, the defendant declared what it intended to do and did exactly what it had declared it would do. Therefore, with the very reason for the rule absent, there is no basis whatever for the application of the rule applied. As between the parties, they knew what interpretation was being attached to the tariff, and they acted in accordance with their knowledge in that regard.

While the foregoing ground of misapplication is somewhat technical, the second ground of misapplication is the more important and is not merely technical in any sense of the word, but pragmatic, for the second ground demonstrates the misapplication of the rule as a whole, due to utilization of the rule as an unconditional rule of law and without reference to cogent surrounding circumstances. In the *Hamberlin* case, *supra*, after stating the foregoing rule and its reasons, the Arizona Supreme Court went on to say, continuing to quote from 17 C.J.S., Contracts, Sec. 324:

"But the rule, it is said, is the *last one* which Courts will apply, and *then only if a satisfactory result cannot be reached by other rules of construction * * **" (Emphasis supplied.)

The Court then went on to state what these "other rules of construction" were, by quoting from 17 C.J.S., Contracts, Sec. 309 (previously cited with approval in *Smith Stage Co. v. Eckert* 21 Ariz. 28, 184 P. 1001):

"Where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument, and apparently conflicting provisions *must be reconciled*, rather than nullify any, *if reconciliation can be effected by any reasonable interpretation*, it being *necessary* for this purpose to consider the entire instrument *and the surrounding circumstances*." (Emphasis supplied.)

It thus appears under the rule of the *Hamberlin* case, which is the most recent pronouncement of the Arizona Supreme Court on this subject, that the "rule of strict construction" which found application in this case may be applied only where apparent ambiguity cannot be reconciled by any reasonable interpretation, and that in determining whether there is any such reasonable interpretation, surrounding circumstances must be considered. It is our position not only that there exists such a "reasonable interpretation" and not only that it is supported by "surrounding circumstances", but that when the surrounding circumstances are considered, there is one, and only one reasonable interpretation, and that the same is not only supported by the surrounding circumstances, but actually compelled by them!

First, it is well to bear in mind that the tariff rate, which is the source of ambiguity herein, was filed with the Corporation Commission in the year 1919, when, it is to be fairly assumed, there were none of the wartime shortages which existed in the years 1943-44. Secondly, the evidence amply demonstrates that it was the virtually universal prac-

tice in Kingman, Arizona, to employ individual meters for each water service. Third, the evidence demonstrates that the original plans for the construction of the Vista Solana housing project contemplated use of such individual meters at each of the 120 units therein contained. If such individual meters had been installed, as originally contemplated, and in accord with the regular practice, the service rendered would have afforded plaintiff the same service at the same rate and in the same manner as was then being provided to other users in like circumstances in the same area.

However, what had been contemplated did not come to pass, for most unusual circumstances presented themselves: these circumstances were manifested in the form of severe material shortages brought about by World War II which made the use of individual meters at the housing project impossible. It is readily seen from the record that had it not been for these material shortages the 120 individual meters would have been installed. Had this been the case there would be no doubt whatever that defendant would be entitled to retain all of the charges which plaintiff seeks to recover. However, as a direct result of these shortages, the individual meters could not be employed and four master meters were substituted in lieu thereof.

What then happened is almost too plain to require statement. It is simply this: As a matter of revenue, defendant was authorized¹⁴ to receive 120 minimum rates and would have received 120 minimum rates through 120 individual meters, except that such individual meters were unavailable. Moreover, defendant was required, in order to avoid discrimination against other users¹⁴ to receive 120 minimum rates, and would have received the same through 120 indi-

14. The authorization and the requirement, respectively, are fully established by the *Munn* case, *Lewis* case, *Florida Power* case, etc., *supra*, Argument I, Issue No. 1, this brief, page 14, et seq.

vidual meters, except that such individual meters were not available. Therefore, in the absence of the actual physical meters, it was simply agreed between the parties that the charges to be made to the plaintiff would be made "as if" they were there, and the parties, by their contract, employed the contract as a "fiction" for billing purposes to equalize the plaintiff's charges to rates then being paid by any other water users and to equalize the rates to what would have been the case had the meters been available.

It therefore appears, when surrounding circumstances are considered, that the whole purpose and intent of this contract between the parties was merely to point out the right of the defendant to receive the minimum charges which it clearly would have been entitled to receive in the absence of these unusual circumstances. The filed tariff, which was promulgated in the year 1919, certainly did not envision a situation where individual meters would be absolutely unavailable, and we believe it is obvious to any reasonable mind that the plain intent of the tariff on file with the Corporation Commission was that a minimum charge of \$2.50 was authorized for each "connection"—that is, each residential unit served by defendant—notwithstanding that an actual physical meter could not be used thereat (see "B. Variance as a Matter of Law", *infra*). It is perhaps true, all things considered, that the tariff "contemplated" the use of such meters, and this fact is supported by the fact that individual meters were then the almost universal practice in Kingman, Arizona. However, it must be borne in mind that this "contemplated fact" had its basis in the material-supply situation existing in 1919 when no shortages were present, and we respectfully submit that what may have been a "contemplation" in 1919 is not a "requirement" in 1944, when such meters were absolutely unavailable. It is therefore seen that the whole purpose of the contract, as

well as its actual result, was to conform the charges paid by plaintiff to those permitted and required by the tariff, the sole and only "variance" being that 120 actual meters were not available; there was no variance in *rates* at all! Plaintiff did not pay one penny more or one penny less than anyone else who received service of this defendant during this period; as stated by I. M. George, president of the defendant, when asked if he negotiated the terms for water service on behalf of defendant:

"Well, I presume you would say that I negotiated the terms for the water service to them, yes; *but the law has provided the amount we should charge for that service*" (T.R. 81) * * * "*these charges were not any different from those made to anybody else in the community, what they were paying for the service. It was the same service charge. It was \$2.50 for a minimum of 3000 gallons per month*" (T.R. 86). (Emphasis supplied.)

Therefore, the only "difference" between services rendered to plaintiff and services rendered to others was that the others had individual meters, whereas plaintiff did not—and plaintiff did not have individual meters solely because of wartime conditions. Such "difference" or "variance" as may have existed by reason of that fact was plainly not a difference which resulted in a change in the rate charged, but was merely a difference in the manner by which the water was delivered. In the one case water would pass through 120 individual meters, in the other case it would not; but in either case, the quantities of water and the charges therefor would be identical. We respectfully submit that under the statutes prohibiting variances, this is no variance at all, inasmuch as the statutes upon which the Government relies (set out in Argument, I, Issue No. 1, Page 14, this brief) prohibit only variance in *charges* and

not variance in the manner by which service is provided. As the statute (Sec. 40-374, A.R.A., *supra*) provides, the prohibition is only that "no public service corporation shall charge, demand, collect or receive a greater, less or different compensation * * * for any product or commodity * * *".

We therefore respectfully submit that the position of the plaintiff in insisting that actual physical meters were required to warrant the minimum charges made is inequitable and wholly untenable, when, upon the facts, it is seen that the plaintiff knew that such meters were unavailable from any source, and in accordance with that knowledge, agreed to pay for service "as if" such meters were there, in order to induce defendant to provide such service. We believe that it is plain, upon all the facts, that the whole result of the instant contract was one of attempted conformance to the statute, rather than variance with it, and that plaintiff's argument seeking to apply a "rule of strict construction" to a writing prepared in 1919, when circumstances were so far unlike those of 1943-44 as to defy imagination, smacks of a nicety which the law cannot and will not tolerate. As the Supreme Court of Arizona has declared: "It is necessary for these purposes to consider * * * the surrounding circumstances". In that regard, we respectfully say that if any circumstances were ever deserving of consideration, the conditions brought about by World War II are deserving of such, and that to ignore them constitutes prejudicial error in and of itself, for there is no doubt whatever that except for these circumstances plaintiff would be utterly without any right to have the judgment to which it now clings.

B. VARIANCE AS A MATTER OF LAW.

Quite apart from the question of misapplication of rules of construction, it is clear that the Court's Conclusion of

Law No. 4 is contrary to law. As pointed out *supra* (footnote 13, page 32), plaintiff's position and the Court's finding is that the filed tariff "does not permit the charge of a monthly \$2.50 minimum per residence unit". Obviously such position and finding purport to lay stress upon the number of meters employed rather than the number of consumers served. We think that merely to state the proposition is to refute it, for it ought to be plain beyond all argument that the service which is rendered by any public utility is not rendered to a number of mechanical devices, but to those persons who use the commodities delivered!

In that regard, we direct the attention of the Court to *Brubaker and Bros. v. Millersburg Water Company* (Pennsylvania Public Service Commission), P.U.R. 1928 A, 808, for not only is the rule so declared therein, but the facts of that case are virtually identical to those herein, to wit: complainant owned a business block, containing stores, apartments, etc., the whole comprising 16 individual tenants. Respondent water company had requested installation of individual meters, which complainant did not do; rather, a single master meter was installed on the service line, and all 16 tenants received water service therefrom. Thereupon, the utility assessed a minimum service charge for each of the tenants so served. The complainant then brought action before the Commission, alleging an overcharge by reason of the utility's assessment of multiple minimum charges instead of applying the published rate to the master meter on the basis of the registered consumption. The issue was whether the utility could properly assess minimum rates for the number of consumers, as was its usual practice. Held: the utility was properly charging 16 minimum charges for the premises in question. As against the complainant's argument that the lack of separate meters neces-

sitated a single minimum service charge merely, the Commission said, quoting from *Borough of South Fork v. South Fork Water Company* (Pennsylvania Public Service Commission), P.U.R. 1923 E, 814, which presented similar facts:

“This reasoning is more plausible than sound, and if made the basis of the Commission’s decision, would appear to discriminate in the distribution of the rate burden equally among all consumers. *This minimum rate is not a charge against the meter, but against the consumer* and it therefore follows that *each consumer should be charged the minimum rate although he may be receiving the water through one metered service line.* * * * so long as different consumers make use of the same service line, *the Commission is not convinced that respondent is violating its filed tariff by charging the minimum rate for each consumer in the line, and after the combined minimum rates have been exhausted, charging for the water thereafter used at the 1000 gallon rate.*” (Emphasis supplied.)

We think it unnecessary to say more than that the billing practice approved in the *Brubaker* case is identical with the facts in the instant case and constitutes exactly what was done by defendant herein. It is therefore clear that the “\$2.50 minimum rate” refers, as a matter of law, to the consumer and not to the meter, and that the tariff not only permits a “per consumer” charge but requires it.

Moreover, the rule laid down above finds full application in connection with multiple dwelling units similar to those in the Vista Solana project. See, for example, *Noble v. City of Troy* (Montana Public Service Commission), P.U.R. 1932 C, 256. There, the complainant owned a group of small buildings which were rented to tourists or others. The issue was whether these cottages or bungalows (similar to the “units” of the Vista Solana project) should be considered as one premise or as separate buildings for the purpose of

billing monthly water consumption. Held: the premises should be considered not as a single service but as a number of individual services. The order of the Commission was entered in accordance therewith. We respectfully submit that the plaintiff herein, as a landlord of tenants occupying 120 separate dwelling units, stands in like position and is therefore subject to like application of the law.

It therefore appears that the Court below was in error in making its Finding of Fact No. 8 and its Conclusion of Law No. 6, when it found that plaintiff was "overcharged" by defendant, for such conclusion is clearly belied by the record—plaintiff was charged no more than any other 120 users. Likewise, the Court erred in making its Conclusion of Law No. 3, which implies that the rate charged by defendant was different from that filed by the defendant with the Corporation Commission, for the undisputed evidence was that there was no "difference" or "variance" whatever as to rates, and that, on the contrary, the contract between the parties was a plain effort to see to it that plaintiff would not be charged either more or less than any other consumer, in spite of circumstances which would not permit the use of individual meters. Each of the above errors, of course, is based upon the Court's erroneous application of the law of the State of Arizona relating to construction of written documents, in that the Court failed to consider surrounding circumstances, the consideration of which cannot result, except in the absence of fairness and reason, in a construction permitting a "per unit" charge in the face of circumstances which rendered a "per meter" charge wholly impossible.

Moreover, apart from all consideration of misapplication of rules of construction, the finding of the Court that minimum charges could not be assessed upon the basis of the number of units was and is wholly contrary to law, for

“the minimum rate is not a charge against the meter, but against the consumer.”

III. (Issue No. 3).

It is now and has long been the law of the State of Arizona that where money is paid voluntarily and under claim of right, with full knowledge of all facts, such money may not be recovered back, *Merrill v. Gordon*, 15 Ariz. 521, 140 P. 496; *Mody v. Lloyd's of London*, 61 Ariz. 534, 152 P.2d 951. Nor is Arizona alone in this view: as noted in *Merrill v. Gordon*, *supra*:

“And this is the rule adopted by the English Courts, the Federal Courts and all the State Courts, except Georgia and Kentucky”.

In the words of the Supreme Court of Arizona, speaking in *Merrill v. Gordon*, *supra*, the rule and its application are as follows:

“* * * It is a familiar and well settled principal of law that, where a person with full knowledge of the circumstances pays money voluntarily, and without compulsion or duress of person or goods, he shall not afterwards recover back the money so paid” * * *

“The general rule as to voluntary payment is stated in 30 Cyc. 1298, as follows:

‘Except where otherwise provided by statute, a party cannot by direct action or by way of set-off or counterclaim, recover money voluntarily paid, with a full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed.’ * * *

The *Merrill* case was subsequently followed in Arizona by the case of *Moody v. Lloyd's of London*, *supra*, where the Arizona Supreme Court quoted from the same general

rule set down in the *Merrill* case, and declared that it adhered to the rule stated therein. The Court also quoted with approval the assignment of error advanced by the appellant therein, to wit: "Payment made voluntarily and with full knowledge of facts precludes the payor from any recovery for such voluntary payment, *and a judgment granting such recovery is error*". (Emphasis supplied.) It is interesting to note that in both of the above cases the plaintiff-payor had judgment (i.e. recovered back monies voluntarily paid), that both cases were reversed on appeal and that the reversal in each case was with directions to the lower Court to dismiss the plaintiff's action.

If the foregoing represents the law of the State of Arizona, then it remains only to determine whether the case of plaintiff herein falls within or without the rules therein declared. In that regard, it is necessary to look no further than plaintiff's Complaint on file herein,¹⁵ from which it is instantly apparent that said Complaint not only fails to state a claim upon which relief can be granted, but that the same states facts precluding recovery under the rule of the cases set out above. As such, the plaintiff's Complaint was attacked by defendant's Motion to Dismiss,¹⁶ and denial of said motion is specified as error herein.

To determine the sufficiency of plaintiff's case it is necessary only to examine the allegations of plaintiff's Complaint to see what relief it was that plaintiff was seeking and upon what theory the same was sought.

15. The full text of the Complaint has been set out in the appendix at the close of this brief.

16. It will be noted that the Motion to Dismiss was not filed until after judgment; in that regard, the defense of failure to state a claim may be made at any time and need not be pleaded in the answer. 2 Moore's Fed. Prac., Par. 12.07, p. 2241; *McLaughlin v. Curtis Publishing Co.* (S.D.N.Y. 1943), 7 F.R. Serv. 12(h) 22, Case 1.

In the first instance, it is apparent that plaintiff was seeking "recovery back" of money merely by reading the title by which plaintiff has denominated the complaint, to wit: "Complaint for Recovery of Overcharges". This fact is confirmed by a reading of the allegations of the Complaint itself, which, so far as material, may be summarized as follows: that plaintiff entered into a contract with defendant and that the contract was performed by both parties; that defendant rendered its statements for services to plaintiff and that said statements were rendered upon a certain basis of computation; that plaintiff paid said statements, with the exception of two statements for June and July, 1951; that the said basis of computation was erroneous and that plaintiff is therefore entitled to a "refund". Patently, the Complaint then is one for recovery of money paid upon an erroneous basis of computation.

If such is the case, and we contend that it cannot be otherwise, then it is axiomatic that plaintiff's case, to be sufficient, must be pleaded within the rules of Arizona common law as those rules bear upon the theory which the Complaint attempts to embrace. The applicable law has been set forth in the foregoing Arizona cases dealing with recovery of payments, and it therefore remains only to examine the plaintiff's Complaint to see whether the Complaint alleges facts sufficient to bring it within (or on the other hand, to take it without) the operation of those rules.

First, did plaintiff pay this money voluntarily? The Complaint itself alleges that to be the fact: statements were rendered and they were promptly paid. Nothing in the Complaint raises the slightest implication that the plaintiff's action in this regard was anything but voluntary.

Second, were the statements paid under claim of right? Again the Complaint evidences that they were, for the

Complaint alleges that defendant delivered quantities of water to plaintiff and rendered a statement therefor each month, each statement setting forth the amount of water billed and basis of its computation.

Third, did the plaintiff have knowledge of all of the facts bearing upon its payments? The Complaint itself again informs us that plaintiff did have such knowledge, for the Complaint alleges a contract between the parties, delivery of water by the defendant, that the "quantities of water so delivered were reported and billed" and that defendant "made its charges as though there were a separate meter at each of the (housing units)", and that "each such bill made the charge at the highest rate provided in the tariff (describing it)". As these allegations indicate, each of these matters was at all times wholly within the knowledge of plaintiff at the very times that the statements spoken of were rendered and paid. Moreover, plaintiff's Complaint concludes its allegations by reference to the "erroneous billing practice" of the defendant, stating that (notwithstanding that the practice was erroneous) "the plaintiff paid all of said billings except (two certain billings, describing them)".

Upon these allegations then, there can be no doubt whatever that plaintiff's case falls within the rules of Arizona law set out above, for the Complaint itself affirmatively establishes that in each case:

- 1) Plaintiff paid voluntarily;
- 2) Under claim of right; and
- 3) With full knowledge of all material facts.

As such, recovery on such a Complaint is clearly barred and "a judgment granting such recovery is error", *Moody v. Lloyd's of London, supra*.

So that there may be no doubt whatever as to the legal insufficiency of the Complaint, its sufficiency can also be

examined from a converse point of view. That is to say, Arizona law recognizes certain "exceptions" to the rule, as where there is "compulsion or duress of goods" or "fraud, duress or extortion", *Merrill v. Gordon, supra*. As heretofore stated, there is not the remotest sort of hint in any of the allegations of the Complaint of any kind of fraud, duress or anything whatever contrary to voluntary action.¹⁷ Moreover, it is to be noted that under the provisions of Rule 9(b), Federal Rules of Civil Procedure, all averments of fraud or mistake and the circumstances constituting them must be pleaded with particularity. This was in no wise done. Patently, plaintiff's complaint was not within any "exception to the rule".

In short, taking every allegation of the Complaint as true, the law bearing upon overpayment of money is such as dictates that plaintiff is entitled to no recovery whatever. It knew all of the facts and it acted—no more is needed to preclude recovery, even though "no obligation to make such payment existed", *Merrill v. Gordon, supra*.

The rule seems harsh; it is, nevertheless, the law, and there are excellent reasons to support it; see, generally, the opinion in *Merrill v. Gordon, supra*, discussing this proposition. It is therefore merely a question of whether the facts of this case are proper to receive the application of the rule pointed out above. In that regard, the propriety of such application is obvious, it being necessary only to add that the law provides that the rule barring recovery of voluntary payments applies fully to cases in which payments for services are made to a public utility, *Illinois Glass Co. v. Chicago Telegraph Co.*, 234 Ill. 535, 85 N.E. 200;

17. Nor, it should be pointed out, were any such elements developed by evidence upon trial; the evidence certainly proved no more than was alleged in the Complaint, and indeed, a good deal less.

Swift and Co. v. Columbia Ry., Gas and Elec. Co. (CCA 4th), 17 Fed. 2d 46; *City of High Point v. Duke Power Co.* (CCA 4th), 120 Fed. 2d 866, and that the rule applies fully to cases in which the United States is the paying party. See: *Bull v. United States*, 295 U.S. 261, 79 L. Ed. 1428, 55 S. Ct. 700, citing with approval *McKnight v. United States*, 98 U.S. 179, 25 L. Ed. 115, in which the United States Supreme Court said:

“the rules of law which apply to the Government and individuals are the same. There is not one law for the former and another for the latter.”

More specifically, the rule has been expressly recognized in the Ninth Circuit as applying to bar the United States from recovering money voluntarily paid. See the opinion in *United States v. Skinner and E. Corp.* (D.C. Wash.), 28 Fed. 2d 373, at page 384, affirmed on the point of voluntary payments by the United States Court of Appeals for the Ninth Circuit in *United States v. Skinner and E. Corp.*, 35 Fed. 2d. 889, at page 896, where the Court of Appeals said, as to certain overpayments sought to be recovered by the Government:

“* * * They are to be deemed *voluntary and not recoverable, whatever view may be taken of the true meaning of the contract.*”

Appeal was dismissed in the United States Supreme Court, 281 U.S. 770, 74 L. Ed. 1176, 50 S. Ct. 248.

In the premises, we respectfully submit that the lower Court's denial of defendant's Motion to Dismiss is and was reversible error and that plaintiff's Complaint and its action should have been and must be dismissed.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed with instruction to enter judgment for the defendant, Kingman Water Company.

Respectfully submitted,

BRICE I. BISHOP and
DONALD R. KUNZ

707 Title and Trust Building
Phoenix, Arizona

Attorneys for Appellant

(Appendix Follows)

Appendix

(Formal Caption of Court and Cause)

COMPLAINT FOR REFUND OF OVERCHARGES

1. This Court has jurisdiction under 28 U.S.C. 1345, in that the United States of America is the plaintiff herein.

2. The Housing Authority of Mohave County is an agency of the County of Mohave authorized to operate housing projects, under lease, for the Federal Government, pursuant to a state statute, to wit, the War and Defense Housing Law, Appx. 5(b) of the 1952 Cumulative Supplement to the Arizona Code, 1939.

3. The defendant is a corporation doing business as a public utility at Kingman, Arizona. By a lease dated July 17, 1944, but effective as of July 1, 1944, the United States of America leased to the Housing Authority of Mohave County a housing project known as Vista Solana Homes, consisting of 31 buildings and containing 120 dwelling units. Said Housing Authority agreed to operate said housing project, to sublet the housing units, and to pay to the United States, as rent, all net profits derived from the operation of said project. Said lease further provided, in Section 16 thereof, that the lessor, the United States of America, would be responsible for the negotiation and execution of contracts for water and electricity services but that the lessee would assume and discharge the obligations of the lessor and act as the representative of the lessor in dealing with the suppliers of utility services under any such contracts.

(NOTE: Complaint contains no Paragraph 4.)

5. Pursuant to the foregoing, the United States of America did enter into a contract with defendant Kingman Water Company for the supplying of water to the said

Vista Solana project, at the rates specified by the published tariff of the defendant applicable to such service. The applicable tariff was Tariff No. 1 dated August 2, 1919, filed on behalf of the defendant by I. M. George. A copy of said Tariff No. 1 is attached hereto, marked Exhibit A, and made a part hereof by incorporation.

5. From May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana housing project through four meters owned and installed by the United States of America. The quantities of water so delivered were reported and billed, for each monthly period, solely on the basis of the amounts appearing on said meters. Nevertheless the defendant made its charges as though there were a separate meter at each of the 120 housing units in the project. Each such bill made the charge, at the highest rate provided in the tariff, for users of less than 3000 gallons, multiplied by 120. The defendant, in its monthly billings, made the further assumption, which was contrary to fact, that each and every one of the 120 units was occupied every month by a water user.

7. As a result of the erroneous billing practice hereinabove described, the defendant overcharged the plaintiffs a total of \$15,824.33 during the period from May 20, 1944 to July, 1951. The defendant (sic) paid all of said billings except the amounts billed for June and July, 1951, which totaled \$1,011.14.

8. The plaintiffs have fully performed all covenants and conditions on their part under the aforesaid contract between the United States of America and the defendant Kingman Water Company.

9. The plaintiffs sought to obtain relief by an application to the appropriate state regulatory body, the Arizona Corporation Commission. Said Commission, however, ruled that it did not have jurisdiction of the controversy.

10. By reason of all the foregoing facts, the defendant is indebted to the plaintiffs herein in the sum of \$14,813.19, interest upon each overpayment from the date thereof at the rate prescribed by the statutes of Arizona, and the costs of this action.

WHEREFORE, the plaintiffs pray judgment against the defendant for \$14,813.19, interest upon each overpayment from the date thereof, the costs of this action, and such other and further relief as may be just and proper.

(Signature of Counsel)

EXHIBIT "A"

WATER RATES OF

Name: KINGMAN WATER COMPANY

Filed by I. M. GEORGE

Address: KINGMAN- ARIZONA Date AUGUST 12-1919
(For details of this classification see text of accounting order, Page 5)

1.-b Commercial—Meter Rates

All Connections Metered. We Require \$5.00 Deposit.

\$2.50 Minimum Rate of 3000 Gallons.

3001 to 50,000 gals.....	.50¢ per Thousand
50,000 to 75,000 gals.....	.45 per Thousand
75,000 to 100,000 gals.....	.40 per Thousand
100,000 to 250,000 gals.....	.35 per Thousand
250,000 to UP gals.....	.30 per Thousand

(Fill in nothing below this line.)

File No. 105	Supplement to
Authority	Classification
Date Effective	Transferred to
Cancelled	Cancelling

Tariff No. 1

PLAINTIFF'S EXHIBIT NO. 2*Contract Between*

THE UNITED STATES OF AMERICA

AND

KINGMAN WATER COMPANY

For the Supplying of Water

THIS CONTRACT, made and entered into this day of, 194..., (To be dated at least 11 days prior to date of initial delivery.), between the United States of America, hereinafter called the "Government," and Kingman Water Company, a corporation organized and existing under and by virtue of the laws of the State of, hereinafter called the "Utility."

WITNESSETH :

WHEREAS, the Utility is now authorized to supply and is engaged in the process of supplying water to customers within the State of Arizona and inter alia to consumers within the area of Kingman; and

WHEREAS, the Federal Public Housing Commissioner, hereinafter called the "Commissioner," desires to contract for the supplying of water to the housing development consisting of approximately 120 units to be located in or near the City of Kingman, (Identification No. ARIZ-2331), hereinafter referred to as the "Development";

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the parties hereto agree as follows :

1. *Supply of Water:* The Utility shall, from the date of initial delivery to the expiration of this contract, supply the water requirements of the Development and of the tenants of the Development.

2. *Determination of Date of Initial Delivery:* The date of initial delivery hereunder shall be the date on which the Utility is first required to furnish water to the Development under the terms of this contract.

3. *Notice to Utility to Commence Delivery:* The Utility shall commence delivery of water to the Development on the date specified in a written notice from the Commissioner or his representative, such notice to be delivered to the Utility not less than ten (10) days prior to the date specified for the commencement of delivery.

4. *Term of the Contract:* This contract shall become effective upon the execution thereof and shall continue in effect for one year; provided, however, that in the absence of notice of intention to terminate served on the Utility by the Commissioner or on the Commissioner by the Utility at least thirty (30) days prior to the expiration of the contract, this contract shall continue for another year and from year to year thereafter until terminated by notice as outlined in this Section. This contract may also be terminated by the Government, if the Government shall sell or otherwise dispose of the Development or any part thereof. In case of such disposal, the Government shall advise the Utility of the date on which title will pass from the Government, at least ten (10) prior to such passage of title, and the Government's obligations under this contract shall cease on the date on which title passes. All obligations of the parties with regard to the rendition of service and payment therefor and with regard to the payment period herein provided for shall commence with the date of initial delivery as defined in Section 2.

5. *Mains and Meters:* The Utility agrees to furnish, install and maintain in proper working order water mains of ample and sufficient size to the metering point or points

of the Development, and to maintain in proper working order the necessary master meter or meters for the Development, without cost to the Government.

6. *Rates:* The Utility agrees to charge the Government and the Government agrees to pay the Utility for water services furnished to the Development under the terms hereof at the following rate per month:

First 3,000 gallons.....	\$2.50 (minimum charge)
Next 3,001 to 50,000 gallons.....	.50 per 1000 gallons
Next 50,001 to 75,000 gallons.....	.45 per 1000 gallons
Next 75,001 to 100,000 gallons.....	.40 per 1000 gallons
Next 100,001 to 250,000 gallons....	.35 per 1000 gallons
All over 250,000 gallons.....	.30 per 1000 gallons

It is understood that if more than one master meter is deemed necessary to register the consumption of water for said Development, the readings of all such master meters will be totalized and considered as one for the purpose of rates and billing as agreed to herein.

7. *Rate Revisions:* Nothing in this contract shall be deemed or construed to preclude the Government and the Utility from changing, amending, or revising the rates agreed to herein, provided the parties hereto shall mutually agree upon said change, amendment or revision. If the Utility shall reduce the general rates for water service in the area of Kingman, the rates herein named shall be reduced in proportion to such reduction.

8. *Reading of Meters:* The meters and metering equipment and instruments shall be read monthly by a representative of the Utility and the representative of the Commissioner. The Utility and the Commissioner, or his representative, shall agree upon a date or dates upon which the meters shall be read for billing purposes. This date shall be the same for each month of the year unless said date falls

on Sunday or a legal holiday in which case the reading shall be made on the next business day following the Sunday or legal holiday.

9. *Billing and Payment:* The period of time elapsing between monthly readings shall constitute the monthly billing period. On or about the tenth (10th) day following meter readings for water service, the Utility shall render a bill to the Commissioner or his representative. Payment of said bill shall be made on or before the tenth (10th) day following the date of rendition, unless said date falls on Sunday or a legal holiday in which case payment may be made on the next business day following the Sunday or legal holiday.

10. *Penalty for Non-Payment:* When any bill is not paid within thirty (30) days after the ten (10) days following the date of rendition, it shall be considered in default. The Utility shall not suspend service to the Development because of non-payment of any monthly bill. The Utility shall have the right to cancel this contract if two successive monthly bills remain unpaid for a period of thirty (30) days after the tenth (10th) day following the date of rendition. Such cancellation shall become effective only after fifteen (15) days' written notice to the Commissioner.

11. *Point of Delivery:* The point of delivery of water hereunder shall be at the outgoing side of the metering equipment of the Government located on or near the Development site at an appropriate location, more specifically defined as follows:

A single service through a six (6) inch meter located at
..... (To be completed by Utility)

12. *Accuracy of Meters:* The meters used in determining the amount of water supplied hereunder shall, by comparison with accurate standards, be tested and calibrated by the Utility at intervals of not to exceed twelve

(12) months. If any meter shall be found inaccurate or incorrect, it shall be restored to an accurate condition or a new meter shall be substituted by the Utility. The Commissioner or his representative shall have the right to request that a special meter test be made at any time. If any test made at the request of the Commissioner or his representative discloses that the meter tested is registering correctly, or within two per cent (2%) of normal, the Government shall bear the expense of such test. The expense of all other tests shall be borne by the Utility. The representative of the Commissioner shall have the right to be present at all meter tests and calibrations. The results of all such tests and calibrations shall be open to examination by such representative, and a report of every test shall be furnished immediately to him.

If the meter is tested and found to be not more than two per cent (2%) above or below normal, it shall be considered to be correct and accurate, insofar as correction of billing is concerned. If, as a result of any such test, said meter is found to register a variation in excess of two per cent (2%) from normal, correction shall be made in the billing, but no such correction shall extend beyond ninety (90) days previous to the day on which inaccuracy is discovered by test. The correction shall be based on the assumption that the consumption was the same as for the most nearly comparable periods of like operation (to be agreed upon by the parties hereto) during which service was correctly metered.

13. *Standard of Service:* The water to be furnished under the terms of this contract shall be of good, clear and wholesome quality and approved by the regulatory public health authorities. It shall be supplied in quantities sufficient for all the purposes and needs of the Development and the tenants thereof. The Utility will maintain sufficient resi-

dual pressure at the discharge side of the meters of the Government on the Development in order to assure adequate fire protection and other necessary service.

14. *Distribution System:* The Government shall furnish, construct, own and operate the complete and entire secondary water distribution system of the Development from the point of delivery.

15. *Resale:* No portion of the water supplied hereunder shall be resold, except that the Government may sell or otherwise distribute water to the tenants of the Development as an incident of tenancy.

16. *Rights of Utility:*

(a) The Government hereby grants to the Utility at all reasonable hours by its duly authorized agents and employees the free right of ingress to and egress from the premises of the Development for the purpose of inspecting, repairing, replacing or removing the property of the Utility, of reading meters, or of performing any work incidental to the supplying of all service hereby contracted for.

(b) The Utility shall have the right to shut off the supply of water to the Development, without notice, only in cases of emergency. If the Utility shall find it necessary to shut off the supply of water to the Development to make replacements or repairs, or for other reason, and no emergency exists, the Utility shall give the Commissioner or his representative reasonable notice of its intention, including the approximate time and duration of such interruption of service.

17. *Annexation of Property of Utility:* Any and all equipment, apparatus and devices necessary to fulfill the Utility's obligation hereunder placed or erected by the Utility on or in property of the Development shall be and remain the property of the Utility regardless of the mode or

manner of its annexation or attachment to real property of the Development.

18. *Liability:* The water supplied under this contract is supplied upon the express condition that after it passes the meter equipment of the Government, it becomes the property of the Government. The Utility shall not be liable for loss or damage to any person or property whatsoever resulting directly or indirectly from the use or misuse or presence of water on the Development premises after it passes said meter equipment, except where such loss or damage shall be shown to have been occasioned by negligence of the Utility, its agents, servants or employees.

19. *Impossibility of Performance:* The Utility shall use all reasonable diligence in providing a constant and uninterrupted supply of water, but the Utility shall not be liable to the Government hereunder, nor shall the Government be liable to the Utility hereunder by reason of failure of the Utility to deliver or the Development to receive water as the result of fire, strike, riot, explosion, flood, accident, breakdown, acts of God or the public enemy, or other acts beyond the control of the party affected; it being the intention of each party to relieve the other of the obligation to supply water or to receive and pay for water when as a result of any of the above-mentioned causes, either party may be unable to deliver or use, in whole or in part, the water herein contracted to be delivered and received. Both parties shall be prompt and diligent in removing and overcoming the cause or causes of said interruption, but nothing herein contained shall be construed as permitting the Utility to refuse to deliver and the Government to refuse to receive water after the cause of interruption has been removed. In case of impaired or defective service, the Commissioner or his representative shall immediately give

notice to the nearest office of the Utility by telephone or otherwise, confirming such notice in writing as soon thereafter as practicable.

20. *Special Provisions*

21. *Previous Contracts Superseded:* This contract supersedes all previous contracts or representations, either written or oral, heretofore in effect by the Utility and the Government with respect to matters herein contained, and constitutes the sole contract by the parties hereto concerning these matters.

22. *Notices:* All notices which, under the terms of this contract, may be given by or issued to a representative of the Commissioner may be given by or issued to Executive Director, Housing Authority of Mohave County, whose address is Kingman, Arizona.

All notices which, under the terms of this contract, are to be given by or issued to the Utility may be given by or issued to whose address is
.....

Either party shall promptly notify the other in writing whenever there is a change in the person who is to give or receive notices on its behalf.

All notices required or authorized to be given under this contract, except the notice set out in Section 19, shall be given in writing and mailed in the ordinary course of business to the last-known address of the appropriate person specified in this contract.

23. *Interest of Member of Congress:* No Member of or Delegate to the Congress of the United States of America or Resident Commissioner shall participate in the funds made available under this contract. Nothing, however, herein contained shall be construed to extend to any incorporated

company, if the agreement be for the general benefit of such corporation or company.

24. *Succession or Assignment:* This contract shall be binding upon the successors or legal assigns of the Utility.

25. *Non-discrimination in Employment:* There shall be no discrimination by reason of race, creed, color, national origin or political affiliations, against any employee or applicant for employment, qualified by training and experience, for work in connection with this contract. The Utility shall include the foregoing provision in all subcontracts for any part of the work of this Contract.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly signed and executed in quadruplicate as of the day and year first above written.

UNITED STATES OF AMERICA

By

For the Federal Public
Housing Commissioner

..... (Utility)

By

(Title)

Seal

Attest:

.....

(Secretary)

No. 15681

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation, Appellant,

VS.

ANDERSON CONSTRUCTION CO., INC., a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

SEP 25 1957

WALLACE P. GILL



No. 15681

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

SUMMERS, BUCEY & HOWARD,

Central Building,
Seattle 4, Washington,

Attorneys for Appellant.

WRIGHT, INNIS, SIMON AND TODD,

1010 1411 Fourth Avenue Bldg.,
Seattle 1, Washington,

Attorneys for Appellee.

United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 4093

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Plaintiff,

vs.

ANDERSON CONSTRUCTION CO., INC., a
Corporation, Defendant.

COMPLAINT

The plaintiff for its complaint against the defend-
ant alleges that:

I.

The plaintiff United States Fidelity and Guar-
anty Company at all times material was and now
is a corporation created and continued as such by
and under the laws of the state of Maryland, of
which it is a citizen and resident.

II.

The defendant Anderson Construction Co., Inc.
at all times material was and now is a corporation
created and continued as such by and under the
laws of the state of Washington, of which it is a
citizen and resident, with its registered office in the
City of Seattle.

III.

The plaintiff at all times material was and now
is duly qualified and fully authorized to engage in

business as a surety within the state of Washington, to which has heretofore been paid all prescribed fees.

IV.

As hereinafter disclosed, this is a civil action in which the matter in controversy between the plaintiff and the defendant exceeds the sum of \$3000, exclusive of interest and costs.

V.

The defendant and others signed and delivered to the plaintiff a written agreement dated June 3, 1955, applying for execution by plaintiff, as surety, of certain bonds to the United States of America in connection with a certain construction contract known as "DA 95-507-ENG-826 Elmendorf & Ladd AFB", said written agreement containing the joint and several written promise of defendant and others to pay forthwith the premium for said bonds in the specified sum of \$47,753.72, a copy of said written agreement marked Exhibit A being attached hereto and embodied herein.

VI.

Pursuant to said written agreement, the plaintiff executed, on behalf of the defendant and other applicants, in favor of United States of America, two bonds, dated May 31, 1955, viz: a performance bond (Government "Standard Form 25") in the sum of \$3,085,178.50, and a payment bond (Government "Standard Form 25A") in the sum of \$2,500,000, copies of which marked, respectively, Exhibit B

and Exhibit C, are attached hereto and embodied herein.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

While payments upon said premium have been made to and received by the plaintiff in amounts aggregating the sum of \$23,876.86, the balance of said premium remains unpaid in the like sum of \$23,876.86, which is long overdue.

IX.

Despite demand having been heretofore made, the defendant has failed and refused to make payment of said delinquent balance, for which it individually is legally obligated.

Wherefore, the plaintiff prays for judgment against the defendant in the sum of \$23,876.86 plus interest at the legal rate of six per cent per annum from the date of said bonds until the date of payment, with costs and disbursements to be taxed.

SUMMERS, BUCEY & HOWARD,

/s/ LANE SUMMERS,

Attorneys for Plaintiff.

EXHIBIT "A"

Contract Application

671679

73000-12-2045-55

United States Fidelity and Guaranty Company
Baltimore, Maryland

Applicants must give full and explicit data under the following heads, and must supply a copy of the Contract for filing with this application. As this requirement is essential to the proper preparation of the bond and the Company's judgment of the case, care in complying with same will expedite the issuance of the bond.

1. Full name of applicant: Islands Construction Company, Inc., a Washington corp., Anderson Construction Co., Inc., a Washington corporation, and Montin-Benson Corporation, a Delaware corporation, as joint venturers of Seattle, Washington.

* * * * *

5. Amount of Bond. Bid: \$. Performance: \$3,085,178.50). Payment: \$2,500,000.00).

6. To whom given? Give full name and business address. If to a corporation, give exact corporate title: U S A.

7. Nature of Contract: DA 95-507-ENG-826 El-mendorf & Ladd A F B.

8. Contract price: \$6,170,357.00.

* * * * *

10. Names of Other Bidders: (a) Kuney Johnson. Bid. \$6,217,839.

* * * * *

16. Date work is to be commenced: Now. Completed: 11/1/56.

17. Penalty for non-completion at above date Premium for completion before above date.....

18. Payments when and how made? Mo.

19. Are payments to be made in cash? Yes.

20. Percentage reserved from payments until completion: 10%.

21. Have you ever had your application for Contract Bond declined by any Company? Ans.....

22. Have you ever applied elsewhere for this Bond? If so, with what result?.....

23. Contracts on Hand: Nil.

* * * * *

Each of the undersigned hereby warrants that the foregoing statements, made to induce United States Fidelity and Guaranty Company (hereinafter called the Company) to execute or procure the bond herein applied for (the term bond being used herein to include all bonds herein applied for and every continuation, renewal, substitute or new bond), are true, and, should the Company execute or procure said bond, hereby agrees as follows: First, to pay or cause to be paid to the Company in advance a premium of \$. for the bid or proposal bond (the same to be credited on the premium for the performance bond if executed or

procured by the Company), and a premium of \$47,753.72 for the performance bond, if any, being at the rate of various per thousand dollars of the amount of (bond) (contract price) stated above for the (term of two years or fraction thereof) (first year or fraction thereof) and an additional premium at the rate of \$. per thousand dollars of the (bond) (uncompleted portion of the contract) annually in advance thereafter until written evidence satisfactory to the Company of its discharge from all liability by reason of having executed or procured said bond shall be furnished to the Company at its Home Office in the City of Baltimore, Maryland; and, should the amount of bond or contract price be increased above the amount thereof stated above, to pay or cause to be paid to the Company an additional premium, at the same rate per thousand dollars of such increased amount, and, should the amount of bond or contract price be decreased below the amount thereof stated above, the Company will, on demand and in accordance with its manual rates and regulations, refund any excess of premium paid; if the contract carries a guaranty or maintenance provision extending the bond beyond acceptance of the work, or if the bond applied for herein guarantees maintenance, each of the undersigned agrees to pay or cause to be paid to the Company in advance a maintenance premium of \$. for the entire term thereof, said maintenance premium being at the rate per annum of \$. per thousand dollars of the amount of (bond) (con-

tract price) stated above; Second, to indemnify the Company against all loss, damages, claims, suits, costs and expenses whatever, including court costs and counsel fees at law or in equity, or liability therefor, which the Company may sustain or incur by reason of: executing or procuring said bond, or making any investigation on account of same, or procuring its release or evidence thereof from same, or defending, prosecuting or settling any claim, suit or other proceeding which may be brought or threatened by or against any of the undersigned or the Company in connection with same or any collateral security hereunder or any of the agreements herein contained, and to place the Company in funds before it shall be required to make any payment; Third, to assign and convey and does hereby assign and convey to the Company as collateral to secure the obligations herein and any other indebtedness or liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, all the right, title and interest of the undersigned in and to: (a) said contract and any change, addition, substitution or new contract (including all retained percentages, deferred payments, earned moneys and all moneys and properties that may be due or become due under said contract, change, addition, substitution or new contract), and every sub-contract let or that may be let in connection therewith and every bond securing the same, and every claim which the undersigned may have or acquire against any person furnishing or agreeing to furnish labor, material,

supplies, machinery, tools or equipment in connection with said contract or any sub-contract; and (b) all machinery, equipment, plant, tools, supplies and materials which are now or may hereafter be about or upon the site of said work, including supplies and materials now or hereafter purchased for or chargeable to said contract which may be in process of construction, or in storage elsewhere, or in transportation to said site; such assignment to be effective as of the date of the construction contract but only in event of (1) any breach of any of the agreements herein contained or of said contract or performance bond or of any other bond executed or procured by the Company on behalf of the applicant herein, or (2) any assignment by the applicant for the benefit of creditors, or the appointment, or any application for the appointment, of a receiver or trustee for said applicant, whether insolvent or not, or (3) any proceeding or the exercise of any right which deprives the applicant of the use of any of the machinery, equipment, plant, tools, supplies or material referred to; Fourth, that in the event of any breach of said contract or performance bond by any of the undersigned, the Company shall have the right, at the expense of the undersigned, to complete said contract or to contract for the completion thereof or to consent to the re-letting or completion thereof by the obligee in said bond; Fifth, that liability hereunder shall extend to and include all amount paid by the Company in good faith under the belief that it was liable therefor or that such payments were necessary to

protect any of its rights hereunder or to avoid or lessen its liability, and the vouchers or other evidence of such payments shall be conclusive evidence of the fact and extent of the liability of the undersigned to the Company in regard thereto; Sixth, to waive and does hereby waive all right to claim any property, including homestead, as exempt from levy, execution, attachment, sale or other legal process under the constitution or law of the United States of America or the Dominion of Canada, or of any state, territory or province; Seventh, that the undersigned shall not be relieved of liability hereunder by the Company's consenting to any change, addition, substitution or new obligation in connection with said bond or any contract covered thereby, notice of any such change, addition, substitution or new obligation being hereby waived; Eighth, that the Company shall have the right to decline to execute said bond or bonds or any of them (including the right, if it shall execute said bid or proposal bond, to decline to execute any or all other bonds herein applied for); Ninth, that the Company may fill up any blanks left, or correct any errors in filling up any blanks, herein or in the said foregoing statements, and such insertions or corrections shall be prima facie correct; Tenth, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising; Eleventh, that

nothing herein contained shall be considered or construed to waive, abridge, or diminish any right or remedy which the Company might have if this instrument were not executed; Twelfth, that each corporate undersigned, if any, warrants that it is financially interested in the execution of said bond and in the performance of the obligation which said bond is given to secure and that it is fully empowered to obligate itself hereby; Thirteenth, that this agreement shall be liberally construed so as to fully protect and indemnify the Company; Fourteenth, that the above agreements shall bind the undersigned and the heirs, personal representatives, successors and assigns thereof jointly and severally and shall inure to the benefit of any co-surety or reinsurer of the Company on said bond.

Signed and sealed as of June 3, 1955.

If corporation sign here.

[Seal] ANDERSON CONSTRUCTION CO.,
INC.,

By Martin Anderson, President.

If corporation sign here.

[Seal] ISLANDS CONSTRUCTION CO.,
INC.,

By Vern J. Oja, Secretary.

If corporation sign here.

MONTIN-BENSON CORPORA-
TION,

By Wm. V. Montin, President.

Attest:

Karl K. Katz, Asst. Secretary.

EXHIBIT "B"

(Copy)

PERFORMANCE BOND

Standard Form 25. Revised November 1950. Prescribed by General Services Administration General Regulation No. 5.

Date bond executed: 5-31-55.

Principal: Islands Construction Company, Inc., a Washington Corporation, Anderson Construction Co., Inc., a Washington Corporation and Montin-Benson Corporation, a Delaware Corporation, as joint venturers of Seattle, Washington.

Surety: United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having its principal office in Baltimore, Maryland.

Penal Sum of Bond: Three Million, Eighty-five Thousand, One Hundred Seventy-eight Dollars and 50/100ths (\$3,085,178.50).

Contract No.: DA 95-507-ENG-826.

Date of Contract: 5-31-55.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain con-

14 *United States Fidelity & Guaranty Co.*

tract with the Government, numbered and dated as shown above and hereto attached;

Now Therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * * * *

Corporate Principal:

ANDERSON CONSTRUCTION CO.,
INC.,

Central Bldg., Seattle, Wash.,

By Martin Anderson,

President.

Attest: Mary E. Galbraith, Asst. Secty.

Corporate Surety:

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
300 Central Bldg., Seattle, Wash.,

By J. C. Beeson,
Attorney-in-Fact.

Attest: C. Fox.

The rate of premium on this bond is Various
per thousand.

Total amount of premium charged, \$47,753.72.

Certificate as to Corporate Principal

I, Mary E. Galbraith, certify that I am the Assistant Secretary of the corporation named as principal in the within bond; that Martin Anderson, who signed the said bond on behalf of the principal, was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

.....

* * * * *

EXHIBIT "C"

(Copy) PAYMENT BOND

Standard Form 25A. Revised November 1950. Prescribed by General Services Administration General Regulation No. 5.

Date bond executed: 5-31-55.

Principal: Islands Construction Company, Inc., a Washington Corporation, Anderson Construction Co., Inc., a Washington Corporation and Montin-

Benson Corporation, a Delaware Corporation, as joint venturers of Seattle, Washington.

Surety: United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having its principal office in Baltimore, Maryland.

Penal Sum of Bond: Two Million Five Hundred Thousand Dollars and No/100 (\$2,500,000.00).

Contract No.: DA 95-507-ENG-826.

Date of Contract: 5-31-55.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract with the Government, numbered and dated as shown above and hereto attached;

Now Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * * * *

Corporate Principal:

ANDERSON CONSTRUCTION CO.,
INC.,

Central Bldg., Seattle, Wash.,

By Martin Anderson,
President.

Attest: Mary E. Galbraith, Asst. Secty.

Corporate Surety:

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
300 Central Bldg., Seattle, Wash.,

By J. C. Beeson,
Attorney-in-Fact.

Attest: C. Fox.

The rate of premium on this bond is.....
per thousand.

Total amount of premium charged: Premium included in charge for Performance Bond.

Certificate as to Corporate Principal

I, Mary E. Galbraith, certify that I am the Assistant Secretary of the corporation named as principal in the within bond; that Martin Anderson, who signed the said bond on behalf of the prin-

cipal, was then President of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for and in behalf of said corporation by authority of its governing body.

* * * * *

[Endorsed]: Filed February 21, 1956.

[Title of District Court and Cause.]

ANSWER

Answering plaintiff's complaint, defendant says:

I.

Defendant admits Paragraphs I, II, III and IV of the complaint.

II.

Except as hereinafter expressly set forth, defendant admits the allegations of Paragraph V.

III.

Defendant admits Paragraphs VI and VII.

IV.

Defendant admits that plaintiff has received amounts aggregating the sum of \$23,876.86, as alleged in Paragraph VIII, and denies the remainder of the said paragraph.

V.

Defendant denies Paragraph IX.

Affirmative Defense

I.

Exhibit A, referred to in Paragraph V of the

complaint, was not complete at the time of signature thereof by defendant and the others whose names appear as signatories to the instrument as pleaded, in that the amount of the premium was left blank, and the figures "47,753.72," which now appear therein were inserted by a person or persons to the defendant unknown after the same was signed and in the possession of plaintiff.

II.

The bonds (Exhibits B and C) were not delivered to defendant or its joint venturers, or to the obligees, on the date (5-31-55) inserted therein, but were delivered at a later date. The said bonds were dated back to correspond with the date of the contract referred to therein, which said contract was not actually executed until substantially later than the said date, and was dated back to the time of the notification to defendant and its joint venturers of the acceptance of their bid.

III.

At the time defendant and its joint venturers signed Exhibit A aforesaid, the agent of the plaintiff requested said defendant and its joint venturers to sign the said application, with the amount of the bond premium left blank, upon the representation and understanding that plaintiff was about to reduce its rates for executing such bonds as surety, and that a sum would be inserted in the said blank space appropriate to giving defendant and its joint venturers the benefit of such reduced rate.

IV.

Said rates were shortly thereafter reduced. In accordance with the said reduced rates the correct total premium for the execution of the said bonds was and is the sum of \$35,576.79.

V.

On or about September 19, 1955, defendant and its joint venturers paid to plaintiff, through its agents, on account of the obligation for the premium on the said bonds, the sum of \$11,938.43, and on or about November 21, 1955, a like sum, or a total of \$23,876.86.

VI.

On or about December 28, 1955, said defendant tendered to agents of the plaintiff two checks, in the amounts respectively of \$2,805.73 and \$8,894.20, or a total of \$11,699.93, being the total amount of the balance of the premium owing to plaintiff from said defendant and its joint venturers on account of the obligation aforesaid. Said checks were drawn on banks in which the drawors had at the said time funds, so that the said checks would have been promptly paid in lawful money of the United States if presented for payment, but the said checks were returned to the joint venturers by agents of the plaintiff, with the assertion that the same were rejected by plaintiff because, and solely because, they were tendered in full discharge of the obligation herein sued upon.

VII.

At all times herein mentioned the joint venturers,

of whom this defendant is one, have been ready, willing and able to pay the amount which is justly owing to plaintiff. They have paid the sums aforesaid and have made the tender aforesaid, which they have informed agents of the plaintiff that they were keeping good, and said joint venturers, on behalf of defendant, will deposit the sum of \$11,699.93 with the Clerk of the Court as soon as the Court will enter an order directing the Clerk to accept the same in keeping the aforesaid tender good.

Wherefore, defendant prays that the plaintiff's complaint be dismissed, and that the Court award to the defendant its costs and attorneys' fees.

WRIGHT, INNIS, SIMON & TODD,
/s/ ARTHUR E. SIMON,
Attorneys for Defendant.

Acknowledgment of Receipt of Copy Attached.
[Endorsed]: Filed July 12, 1956.

[Title of District Court and Cause.]

STIPULATION AND ORDER REGARDING TENDER INTO COURT

It is hereby stipulated by the parties to the above cause through their respective undersigned attorneys that the said defendant may deposit with the Clerk of this Court, the sum of Eleven Thousand Six Hundred Ninety-nine Dollars and Ninety-three Cents (\$11,699.93) in connection with the tender referred to in the Answer of the said defendant and that the Court may enter this order directing

the Clerk to accept the check of the defendant in the said amount and to hold the proceeds thereof pursuant to the further order of the Court herein.

Dated this 12th day of July, 1956.

/s/ LANE SUMMERS,
SUMMERS, BUCEY & HOWARD,
Attorneys for Plaintiff.

/s/ ARTHUR E. SIMON,
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Defendant.

It Is So Ordered. Dated this 12th day of July, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ PRISCILLA A. TOWNSEND,
WRIGHT, INNIS, SIMON & TODD,
Attorneys for Defendant.

[Endorsed]: Filed July 12, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR LEAVE TO
AMEND ITS COMPLAINT

• The plaintiff, invoking F.R.C.P. Rule 15(a), hereby moves for order of court granting leave to amend its complaint largely by adding to and inserting in the same allegations contained in Article VIII, as disclosed by its proposed Amended Com-

plaint, a copy of which is hereto attached as a part hereof.

Dated this 16th day of August, 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AMENDED COMPLAINT

The plaintiff for its amended complaint against the defendant alleges that:

I.

The plaintiff United States Fidelity and Guaranty Company at all times material was and now is a corporation created and continued as such by and under the laws of the state of Maryland, of which it is a citizen and resident.

II.

The defendant Anderson Construction Co., Inc. at all times material was and now is a corporation created and continued as such by and under the laws of the state of Washington, of which it is a citizen and resident, with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and fully authorized to engage in business as a surety within the state of Washington, to which has heretofore been paid all prescribed fees.

IV.

As hereinafter disclosed, this is a civil action in which the matter in controversy between the plaintiff and the defendant exceeds the sum of \$3000, exclusive of interest and costs.

V.

The defendant and others signed and delivered to the plaintiff at Seattle, Washington, a written agreement dated June 3, 1955, applying for execution by plaintiff, as surety, of certain bonds to the United States of America in connection with a certain construction contract known as 'DA 95-507-ENG-826 Elmendorf & Ladd AFB', said written agreement containing the joint and several written promise of defendant and others to pay forthwith the premium for said bonds in the specified sum of \$47,753.72, a copy of said written agreement marked Exhibit A being embodied herein as attached to plaintiff's original complaint.

VI.

Pursuant to said written agreement, the plaintiff executed, on behalf of the defendant and other applicants, in favor of United States of America, two bonds, dated May 31, 1955, viz: a performance bond (Government "Standard Form 25") in the sum of \$3,085,178.50, and a payment bond (Government "Standard Form 25A") in the sum of \$2,500,000, copies of which marked, respectively, Exhibit B and Exhibit C being embodied herein as attached to plaintiff's original complaint.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

1. The plaintiff, in so engaging in its said business as a surety, at all times material was and now is subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79) as amended, in consequence of provisions contained in §.01.04 and §.11.08(4) thereof.

2. Pursuant to the requirements of such Insurance Code (§.19.04 and §.19.05) the plaintiff caused to be filed in the office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on said bonds, which same having been accepted and approved by said Insurance Commissioner (§.19.06) became effective and binding as of the 30th day of April, 1951, and subsequently continued effective and binding until after the 20th day of July, 1955.

3. Said rates were applicable to the premium on said bonds and were effective and binding as to both the plaintiff and the defendant where and when the defendant became obligated upon said written agreement dated June 3, 1955 (Exhibit A, attached to the plaintiff's original complaint) and also where and when the plaintiff became obligated as surety upon said two bonds dated May 31, 1955, executed in favor of the United States of America

(Exhibit B and Exhibit C, attached to the plaintiff's original complaint).

4. The premium for said bonds in said sum of \$47,753.72, which the defendant promised to pay according to said written agreement, was rightly computed upon and correctly calculated at said premium rates then so effective and binding.

5. Said Insurance Code at all times material did and now does contain prohibitions as follows:

“Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” (Section .30.14.)

“Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not law-

fully entitled as a licensed agent, broker, or solicitor. * * *” (Section .30.17.)

6. The premium for said bonds in said sum of \$47,753.72 was and is the only amount of premium legally chargeable by the plaintiff and legally payable by the defendant.

IX.

While payments upon said premium have been made to and received by the plaintiff in amounts aggregating the sum of \$23,876.86, the balance of said premium remains unpaid in the like sum of \$23,876.86, which is long overdue.

X.

Despite demand having been heretofore made, the defendant has failed and refused to make payment of said delinquent balance, for which it individually is legally obligated.

Wherefore, the plaintiff prays for judgment against the defendant in the sum of \$23,876.86 plus interest at the legal rate of six per cent per annum from the date of said bonds until the date of payment, with costs and disbursements to be taxed.

SUMMERS, BUCEY & HOWARD,
LANE SUMMERS,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY

The plaintiff, pursuant to previous order of court, for its reply to the "Affirmative Defense" in the Defendant's answer, admits, denies and alleges that:

I.

The plaintiff denies the averments in Paragraph I.

II.

The plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph II, except only as hereafter expressly admitted:

The plaintiff admits said bonds (Exhibit "B" and Exhibit "C") were not delivered to the defendants or its joint venturers or the obligee on the 31st day of May 1955. However, the plaintiff alleges said bonds were delivered to and received by the obligee before or on the 17th day of June 1955, after earlier execution thereof both by the defendant, as principal, and by the plaintiff, as surety.

III.

The plaintiff denies the averments in paragraph III.

IV.

The plaintiff denies the averments in Paragraph IV except only as hereafter expressly admitted:

The plaintiff admits its rates of premium for bonds within the same classification as those in-

volved were reduced on the 20th of July 1955, such reduced rates to become operative only after that date.

V.

The plaintiff admits the averments of Paragraph V.

VI.

The plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph VI except only as hereafter expressly denied or expressly admitted:

The plaintiff admits tender to it by the defendant of two checks—one being for \$2,805.73 and one being for \$8,894.20—amounting to \$11,699.93.

The plaintiff denies the sum of \$11,699.93 as being the total amount of the balance of premium owing to it by the defendant.

The plaintiff denies said checks were rejected by it and returned to the defendant solely because they were so tendered in full discharge of the defendant's obligation. But the plaintiff admits said checks were rejected by it and returned to the defendant because they were so tendered in full discharge of the defendant's obligation and also because they were calculated upon the basis of rates of premium not applicable to said written agreement (Exhibit "A") and not applicable to said bonds (Exhibit "B" and "C").

VII.

The plaintiff denies the averments of Paragraph VII except only as hereafter expressly admitted:

The plaintiff admits the defendant was prepared to keep good its tender of \$11,699.93, which amount was deposited for that purpose with the Clerk of the above entitled court on the 12th of July, 1956.

VIII.

The plaintiff, in engaging in its said business as a surety, in accepting said written agreement from the defendant (Exhibit "A") and in executing said bonds (Exhibit "B" and Exhibit "C") at all times material was and is subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79) as amended, in consequence of provisions contained in §.01.04 and §.11.08 (4) thereof.

IX.

Pursuant to the requirements of such Insurance Code (§.19.04 and §.19.05) the plaintiff caused to be filed through a licensed rating organization in the office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on said bonds, which same having been accepted and approved by said Insurance Commissioner (§.19.06) became effective and binding as of the 30th day of April, 1951, and subsequently continued effective and binding until after the 20th day of July, 1955.

X.

Said rates were applicable to the premium on said bonds and were effective and binding as to both the plaintiff and the defendant when the defendant became obligated upon said written agree-

ment dated June 3, 1955 (Exhibit "A"), and when the plaintiff became obligated as surety upon said two bonds dated May 31, 1955, executed in favor of the United States of America (Exhibit "B" and Exhibit "C"), and also when the United States of America, after receiving and accepting the defendant's construction contract known as "DA-95-507-ENG-826 Elmendorf & Ladd A F B" with said bonds, authorized and directed the defendant to proceed with work thereunder on the 17th of June 1955.

XI.

The premium for said bonds in said sum of \$47,753.72, which the defendant promised to pay according to said written agreement, was rightly computed upon and correctly calculated at said premium rates then so effective and binding.

XII.

Said Insurance Code at all times material did and does contain mandates and prohibitions as follows:

"1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes."

"3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect,

except as is provided by section .10.09.” (Section .19.04.)

“1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.” (Section .19.05.)

“1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.” (Section .19.28.)

“Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” (Section .30.14.)

“Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully

entitled as a licensed agent, broker, or solicitor.
* * * *” (Section .30.17.)

XIII.

The premium for said bonds in said sum of \$47,753.72 was and is the only amount of premium legally chargeable by the plaintiff and legally payable by the defendant.

Wherefore, the plaintiff having fully replied prays for judgment against the defendant as sought by its complaint.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS
BY DEFENDANT

The plaintiff, invoking FRCP Rule 36, requests the defendant to make, within twelve (12) days after service hereof, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, admissions as to the genuineness of documents and the truth of statements, as follows:

1. That the document (of which copy marked “Exhibit 1” is attached hereto, being the plaintiff’s premium rates as filed with the Insurance Commis-

sioner of the State of Washington for effect after the 30th of April, 1951, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C"), is genuine.

2. That the document (of which copy marked "Exhibit 2" is attached hereto) being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the 20th day of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C"), is genuine.

3. That the plaintiff's said premium rates as specified by "Exhibit 1" continued to be effective until superseded by the plaintiff's said premium rates as specified by "Exhibit 2".

4. That the amount of premium, according to the plaintiff's claim in the sum of \$47,753.72 was calculated by applying the rates as specified in "Exhibit 1".

5. That the amount of premium, according to the defendant's contention, in the sum of \$35,576.79, was calculated by applying the rates as specified in "Exhibit 2".

6. That the defendant's written agreement with the plaintiff (Exhibit "A") was in all respects complete before the 17th of June 1955.

7. That said bonds (Exhibit "B" and Exhibit "C") were fully executed both by the defendant,

as principal, and by the plaintiff, as surety, before the 17th of June, 1955.

8. That said bonds (Exhibit "B" and Exhibit "C") were delivered by or for the defendant and received by or for the obligee, the United States of America, before or on the 17th of June, 1955.

9. That said bonds (Exhibit "B" and Exhibit "C") were accepted in behalf of the United States of America as obligee before or on the 17th of June, 1955.

10. That notification to the joint venturers, including the defendant, to proceed with performance under their construction contract, identified as "DA-95-507-ENG-826 Elmendorf & Ladd A F B", was issued by or for the United States of America on the 17th of June, 1955.

11. That said bonds (Exhibit "B" and Exhibit "C") became binding obligations of the defendant as principal and of the plaintiff as surety not later than the 17th of June, 1955.

12. That the bid submitted by or for the joint venturers, including the defendant, to induce said construction contract, identified as "DA - 95 - 507 - ENG-826 Elmendorf & Ladd A F B", was calculated in part upon consideration of premium for bonds required thereby, at premium rates as specified in "Exhibit 1".

13. That the bid submitted by or for the joint venturers, including the defendant, to induce said construction contract, identified as "DA - 95 - 507 -

ENG-826 Elmendorf & Ladd A F B", was calculated in part upon consideration of premium for bonds required thereby, in the sum of \$47,753.72 or thereabouts, and not in the sum of \$35,576.79, or thereabouts.

Dated this 21st day of September 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,

Attorneys for Plaintiff.

EXHIBIT No. 1

Revision of April 30, 1951

CONTRACT BONDS

Where Contract Price is \$2,500,000 or more.

Basic Rate Table

Stipulated time for completion not over 24 months or 744 calendar days: (For the first 14 days, exceeding 24 months, there is no percentage increase).

Contract Price	Rate per M for the full term
First \$2,500,000	\$8.00
Next 2,500,000	7.67
Next 2,500,000	7.33
Over 7,500,000	6.67

Supplemental Rate Table

Stipulated time for completion—25 months or 745 calendar days to 60 months or 1840 calendar days:

Compute term premium at rates given in Basic Rate Table above. To this computation add the percentage in the Supplemental Rate Table below for the total number of days in the stipulated time for completion.

Calendar Days Add to Complete %	Calendar Days Add to Complete %	Calendar Days Add to Complete %
745 to 775.... 1	1,135 to 1,140....20	1,491 to 1,494....32
776 to 803.... 2	1,141 to 1,168....21	1,495 to 1,498....33
834 to 934.... 3	1,169 to 1,199....22	1,499 to 1,502....34
835 to 864.... 5	1,200 to 1,229....22	1,503 to 1,505....35
865 to 895.... 6	1,230 to 1,260....23	1,506 to 1,534....36
896 to 925.... 7	1,261 to 1,290....24	1,535 to 1,565....36
926 to 956.... 8	1,291 to 1,321....24	1,566 to 1,595....37
957 to 987....10	1,322 to 1,352....25	1,596 to 1,626....37
988 to 1,017....11	1,353 to 1,382....26	1,627 to 1,656....37
1,018 to 1,048....12	1,383 to 1,413....26	1,657 to 1,687....38
1,049 to 1,078....13	1,414 to 1,443....26	1,688 to 1,718 38
1,079 to 1,109....15	1,444 to 1,474....27	1,719 to 1,748....39
1,110 to 1,116....16	1,475 to 1,478....28	1,749 to 1,779....39
1,117 to 1,122....17	1,479 to 1,482....29	1,780 to 1,809....39
1,123 to 1,128....18	1,483 to 1,486....30	1,810 to 1,840....40
1,129 to 1,134....19	1,487 to 1,490....31	

Example:

Contract price, \$10,000,000; Stipulated time for completion, 1,505 calendar days.

First \$ 2,500,000 @ \$8.00.....	\$20,000.00
Next 2,500,000 @ 7.67.....	19,175.00
Next 2,500,000 @ 7.33.....	18,325.00
Next 2,500,000 @ 6.67.....	16,675.00

\$10,000,000	\$74,175.00
Add 35% for Term (1,505 days).....	25,961.25

Term Premium\$100,136.25

EXHIBIT No. 2

*New Page, July 20, 1955

(Temporary Page C-9)

CONTRACT BONDS

Class B Contracts

Manual page C-9 is hereby amended by deleting Sections 1 and 2 and substituting the following:

1. (a) For Performance or Performance Plus Payment Bond(s):

Basic Rate Table

Where stipulated time for completion is not over 24 months or 731 calendar days:

Contract Price	Rate Per M
First \$100,000.....	\$10.00
Next 2,400,000.....	6.50
Next 2,500,000.....	5.25
Next 2,500,000.....	5.00
Over 7,500,000.....	4.70
Minimum—\$10.00.	

Maximum—\$50.00 per M on the aggregate penalty of Performance and Payment Bonds.

Supplemental Rate Table

Where stipulated time for completion is over 24 months or 731 calendar days:

Compute basic premium at above rates and increase this computation by 1% per month for each month over 24 months (disregarding a fraction of a month).

* * * * *

Examples:

(1) Contract price, \$2,500,000; Stipulated time for completion 30½ months.

First \$ 100,000 @ \$10.00.....	\$ 1,000.00
Next 2,400,000 @ 6.50.....	15,600.00
<hr/>	
\$2,500,000	\$16,600.00
Add 6% for term (30 months).....	996.00

Term Premium \$17,596.00

(2) Contract Price, \$10,000,000; Stipulated time for completion 4 years (48 months).

First \$ 100,000 @ \$10.00.....	\$ 1,000.00
Next 2,400,000 @ 6.50.....	15,600.00
Next 2,500,000 @ 5.25.....	13,125.00
Next 2,500,000 @ 5.00.....	12,500.00
Next 2,500,000 @ 4.70.....	11,750.00
<hr/>	
\$10,000,000	\$53,975.00
Add 24% for term (48 months).....	12,954.00

Term Premium \$66,929.00

(b) For Payment Bonds only—apply rates p. C-30.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant, Anderson Construction Co., Inc., requests plaintiff, United States Fidelity and Guaranty Company, within twelve days after service of this Request, to make the following admissions for the purpose of this action only, and subject to the pertinent objections to admissibility which may be interposed at the trial.

That each of the following statements is true:

1. That the representative of plaintiff who conducted the negotiations with defendant resulting in the signing by defendant of Exhibit A attached to plaintiff's complaint was Jack Beeson.
2. That at the time of the delivery by defendant of said Exhibit A to Jack Beeson, the amount of the premiums was an unfilled blank.
3. That at the said time, plaintiff had been considering a reduction of its bond premium rates for bonds such as Exhibits B and C, attached to the complaint.
4. That at the said time, plaintiff had determined to reduce such rates.
5. That at the said time, the rates at which such bonds would have been written by certain qualified competing companies (non-Board companies) were substantially lower than plaintiff's rates.
6. That the reductions which plaintiff then contemplated were calculated to make plaintiff's rates

more nearly competitive with the rates charged by said non-Board companies.

7. That the said Jack Beeson was advised of the said contemplated reduction in plaintiff's rates.

8. That the contemplated reductions were actually made.

9. That schedules setting forth the same were filed with the Insurance Commissioner of the State of Washington before July 20, 1955.

10. That the reduction in rates as applied to the premiums on Exhibits B and C attached to plaintiff's complaint amounted to \$12,176.93.

11. That this reduction was in excess of 25% of the premium now claimed by plaintiff.

12. That there was no substantial reduction in the cost of plaintiff's operations between June 17, 1955 and July 20, 1955.

13. That the rate claimed by plaintiff to have been in force in June, 1955, was unreasonable and excessive by at least 25%.

14. That plaintiff's rates for executing Exhibits B and C as surety were based upon an allowable period up to 24 months for the completion of the contract of which performance was guaranteed.

15. That for more than 22 of those 24 months, the reduced rates which defendant claims should apply were in effect.

16. That in the State of Washington where the rates charged by insurance companies have been reduced during the term of existing policies such as fire insurance, it has been customary for the

companies to refund a pro-rated share of the premium in accordance with such reduction.

17. That Jack Beeson agreed to fill in the blanks on Exhibit A with a total premium calculated at the new rates.

18. That the correct amount of the premium on said Exhibits B and C, if calculated at the new rates, would be \$35,576.79.

19. That of the said sum of \$35,576.79, defendant and its co-venturers caused to be paid to plaintiff before the institution of this action, the sum of \$23,876.86, and tendered to plaintiff an additional sum of \$11,699.93 and kept the said tender good by deposit of said amount with the Clerk of this Court.

WRIGHT, INNIS, SIMON & TODD,
/s/ ARTHUR E. SIMON,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR
ADMISSIONS

State of Washington
County of King—ss.

Martin Anderson, President of Anderson Construction Co., Inc., defendant above named, for and on behalf of the said defendant makes the following admissions and denials in response to the Re-

quest for Admissions served upon counsel for said defendant on September 21, 1956 on behalf of United States Fidelity and Guaranty Company, plaintiff above named.

Request No. 1—Defendant cannot truthfully admit or deny statement No. 1, for the reason that until the service of plaintiff's request herein affiant had never seen a copy of Exhibit No. 1 therein referred to, and has never had any information as to the filing thereof with the Insurance Commissioner of the State of Washington.

Request No. 2—For the same reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny the truth of the matters and things referred to in Request No. 2.

Request No. 3—For the reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny statement No. 3.

Request No. 4—Defendant admits that a calculation of the bond premium for a contract in the amount referred to in Exhibits B and C attached to plaintiff's complaint, at the rates set forth in Exhibit No. 1 attached to plaintiff's Request for Admissions would amount to approximately \$47,753.72.

Request No. 5 — Defendant admits that the amount of premium therein referred to was calculated by applying rates like those referred to in Exhibit 2 attached to plaintiff's Request for Admissions.

Request No. 6—Defendant cannot truthfully ad-

mit or deny statement No. 6, for the reason that Exhibit A was incomplete at the time the same was delivered by defendant to J. C. Beeson, plaintiff's agent, representative and attorney in fact, in that the amount of the premium was left blank, and affiant does not know when or by whom the said blanks were filled and affiant was never furnished with a completed copy of the said Exhibit A.

Request No. 7—In response to Request No. 7, defendant admits that the bonds referred to were executed by defendant as principal and by plaintiff as surety before the 17th day of June, 1955, but defendant cannot truthfully admit or deny whether all blanks in the said bonds had been filled prior to said date, or whether the same were in fact ever filled, for the reason, among other things, that no completed copy of the said bonds was ever made available to defendant or its joint-venturers.

Request No. 8 — Defendant admits the matter stated therein.

Request No. 9 — Defendant admits the matter stated therein.

Request No. 10—Defendant believes that the matters stated in Request No. 10 are correct, because defendant's joint-venturers received a telegram to proceed with performance on June 20, 1955.

Request No. 11—Defendant admits the matters stated therein.

Request No. 12—Defendant denies the matters stated therein and states that relying upon the promised reduction in rates the bid ultimately submitted by defendant and its joint-venturers was re-

duced to pass the benefit of such reduction to the Government.

Request No. 13—Defendant denies the matter set forth in this request, for the reasons heretofore set forth in the immediately foregoing answer.

/s/ MARTIN ANDERSON,

Subscribed and sworn to before me, this 25th day of September, 1956.

[Seal] /s/ C. M. DWYER,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR ORDER RELATIVE TO DEFENDANT'S RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiff moves in the alternative for order of court either striking the responses of defendant to certain requests of plaintiff for admissions under FRCP Rule 36 or requiring direct responses thereto making definite admissions or denials, such requests of plaintiff and such responses of defendant being as follows:

Plaintiff's request No. 1: That the document (of which copy marked "Exhibit 1" is attached hereto) being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washing-

ton for effect after the 30th of April, 1951, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C") is genuine.

Defendant's response No. 1: Defendant cannot truthfully admit or deny statement No. 1, for the reason that until the service of plaintiff's request herein affiant had never seen a copy of Exhibit No. 1 therein referred to, and has never had any information as to the filing thereof with the Insurance Commissioner of the State of Washington.

This response is evasive and non-committal. The information upon which to base a definite admission or denial is specifically available to the defendant as a matter of public record in the office of the Insurance Commissioner of the State of Washington.

Plaintiff's request No. 2: That the document (of which copy marked "Exhibit 2" is attached hereto) being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action (Exhibit "B" and Exhibit "C"), is genuine.

Defendant's response No. 2: For the same reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny the truth of the matters and things referred to in Request No. 2.

This response is evasive and non-committal. The information upon which to base a definite admission or denial is specifically available to the defendant

as a matter of public record in the office of the Insurance Commissioner of the State of Washington.

Plaintiff's request No. 3: That the plaintiff's said premium rates as specified by "Exhibit 1" continued to be effective until superseded by the plaintiff's said premium rates as specified by "Exhibit 2".

Defendant's response No. 3: For the reasons heretofore given with respect to Request No. 1 affiant cannot truthfully admit or deny statement No. 3.

This response is evasive and non-committal. The information upon which to base a definite admission or denial is specifically available to the defendant as a matter of public record in the office of the Insurance Commissioner of the State of Washington.

Plaintiff's request No. 7: That said bonds (Exhibit "B" and Exhibit "C") were fully executed both by the defendant, as principal, and by the plaintiff, as surety, before the 17th of June, 1955.

Defendant's response No. 7: In response to Request No. 7, defendant admits that the bonds referred to were executed by defendant as principal and by plaintiff as surety before the 17th day of June, 1955, but defendant cannot truthfully admit or deny whether all blanks in the said bonds had been filled prior to said date, or whether the same were in fact ever filled, for the reason, among other things, that no completed copy of the said bonds

was ever made available to defendant or its joint-venturers.

This response is evasive and non-committal. The recital of fact in plaintiff's request for admission relates not to copies but to originals of bonds (Exhibit "B" and Exhibit "C") which defendant possessed and which defendant executed according to its own admission. The information upon which to base definite admission or denial was available to defendant when it possessed and executed said bonds and is available to defendant by enquiring of the obligee on the bonds, the United States of America.

Dated this 2nd day of October 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 3, 1956.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

The Plaintiff, through Lane Summers, one of its attorneys of record, makes Response to Request for Admission served in behalf of the Defendant on the 26th of September, 1956, as follows:

Response to Request No. 14:

Yes, as expressly provided by written agreement signed by the Defendant (Exhibit "A").

Response to Request No. 19:

Yes.

Dated this 8th day of October, 1956.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,
Plaintiff,

/s/ By LANE SUMMERS,
One of Its Attorneys.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 8, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFEND- ANT'S REQUESTS FOR ADMISSIONS

Invoking FRCP Rule 36 (a), the plaintiff hereby makes separate objection to each request made by the defendant for admission (except only Request No. 14 and Request No. 19), the objection being upon the ground that each such request is irrelevant.

The plaintiff hereby makes further separate objection to Request No. 5 upon the grounds that the same is vague and indefinite, and that the plaintiff should not be required to conduct independent enquiries among competing surety companies for information probably more readily available to the defendant than to the plaintiff.

The plaintiff hereby makes further separate objection to Request No. 11 upon the ground that the

same is frivolous calling for a mere percentage calculation of figures already known to the defendant.

The plaintiff hereby makes further separate objection to Request No. 13 upon the grounds that the same is frivolous and argumentative, and that the plaintiff's premium rate in force in June 1955 could not be "unreasonable and excessive" since the same was the legal effective rate as filed and approved by the Insurance Commissioner—therefore, the only rate that the plaintiff could lawfully charge and the defendant could lawfully pay.

The plaintiff hereby makes further separate objection to Request No. 15 upon the ground that the same is frivolous calling for a simple mathematical calculation.

Dated this 8th day of October, 1956.

SUMMERS, BUCEY & HOWARD,
/s/ LANE SUMMERS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 8, 1956.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S OBJECTIONS TO
DEFENDANT'S REQUEST FOR ADMIS-
SIONS

This matter having come on duly and regularly for hearing on October 15, 1956, before the Honorable John C. Bowen, one of the Judges of this

Court, upon plaintiff's objections to defendant's Request for Admissions herein; the plaintiff being represented by Richard W. Buchanan, of Summers, Bucey & Howard, and the defendant being represented by Arthur E. Simon, of Wright, Innis, Simon & Todd; and the Court having heard the argument of counsel and being in all things advised, it is by the Court

Ordered:

1. That plaintiff's objections to defendant's Request for Admissions be and the same are hereby overruled, save and except the objections of the plaintiff to Request No. 5 and Request No. 11. As to the said numbered Requests the objection of plaintiff is sustained.

2. That the time within which plaintiff may respond to the defendant's Request for Admissions to which objection has not been sustained is hereby extended to ten days from the date hereof.

3. That by this ruling the Court has not indicated any final determination concerning the validity of the agreement referred to in the Affirmative Defense set forth in the Answer of the defendant herein, and the right is preserved to the parties to present the said issue in any proper manner hereafter.

Done in Open Court this 16th day of October, 1956.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ PRISCILLA A. TOWNSEND,
Of Counsel for Defendant.

No objection as to form, and notice of presentation waived.

/s/ LANE SUMMERS,
Of Counsel for Plaintiff.

[Endorsed]: Filed Oct. 16, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSES TO DEFENDANT'S REQUESTS FOR ADMISSIONS

State of Washington,
County of King—ss.

Jack Beeson, in behalf of the United States Fidelity and Guaranty Company, as plaintiff, makes responses to the Defendant's Requests for Admissions, as follows:

Request No. 1: Yes.

Request No. 2: No. The amount of the premium in the sum of \$47,753.72 was filled in the blank on the original of Exhibit "A" signed by the defendant.

Request No. 17: No.

/s/ J. C. BEESON.

Subscribed and sworn to before me this 17th day of October, 1956.

[Seal] /s/ LANE SUMMERS,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 24, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSES TO DEFEND-
ANT'S REQUESTS FOR ADMISSIONS

State of Maryland,
City of Baltimore—ss.

J. Harry Cross, being Vice-President and General Counsel of the United States Fidelity and Guaranty Company, in its behalf as plaintiff, makes responses to the Defendant's Requests for Admissions, as follows:

Request No. 3: No. In explanation, a reduction in the rates for bonds in the classification of Exhibit "B" and Exhibit "C" was being given consideration by The Surety Association of America, in which consideration the plaintiff did not participate; and the action of such association was not announced to the plaintiff until the 2nd of July 1955.

Request No. 4: No.

Request No. 5: No response required under court order.

Request No. 6: There was no such contemplation or calculation by the plaintiff since the advisability of any change in rates was being considered by The Surety Association of America.

Request No. 7: No, for the same reason heretofore given in response to Request No. 6.

Request No. 8: No. However, reduction in rates was actually made as contemplated by The Surety Association of America but not by the plaintiff.

Request No. 9: The schedule setting forth the reduction in rates for a number of surety companies, including the plaintiff, was filed by The Surety Association of America with the Insurance Commissioner on the 5th of July 1955, the same becoming effective on the 20th of July 1955.

Request No. 10: No, reduction did not apply to premium on Exhibit "B" and Exhibit "C".

Request No. 11: No response required under Court Order.

Request No. 12: The plaintiff cannot truthfully admit or deny statement in Request No. 12 for the reason that it has no data or statistics upon which it can determine the cost of its operations as between the 17th of June 1955 and the 20th of July 1955.

Request No. 13: No. The plaintiff's premium rate as effective in June 1955 was approved by the Insurance Commissioner of the State of Washington.

Request No. 14: Yes, as provided by written agreement signed by the defendant (Exhibit "A").

Request No. 15: The reduced rates became effective on the 20th of July 1955.

Request No. 16: No, as to policies not subject to cancellation like surety bonds; yes, only as to policies subject to cancellation unlike surety bonds.

Request No. 18: Yes.

Request No. 19: No. That, after being billed by the plaintiff for its premium in the sum of \$47,753.72, by invoices dated July 1, 1955, August 1,

1955, and September 1, 1955, the defendant, without protesting that amount, made partial payments thereon, each being one-quarter thereof, to wit: The sum of \$11,938.47 on or about September 19, 1955, and the sum of \$11,938.47 on or about October 21, 1955; that such payments left unpaid the sum of \$23,876.86. That thereafter, before the institution of this action, the defendant tendered to the plaintiff the sum of \$11,699.93, which amount was subsequently deposited with the Clerk of this Court.

/s/ J. HARRY CROSS.

Subscribed and sworn to before me this 22nd day of October, 1956.

[Seal] ELEANORE D. SMITH,

Notary Public in and for the State of Maryland,
acting at Baltimore City.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 24, 1956.

[Title of District Court and Cause.]

REQUEST FOR PRE-TRIAL

To: Anderson Construction Co., Inc., defendant,
and Wright, Innis, Simon & Todd, its attorneys:

Please take notice that under Rule 16 of the Federal Rules of Civil Procedure and Rule 37(G) of the Local Rules of the United States District Court for the Western District of Washington, plaintiff

by its attorneys does request a pre-trial conference to consider:

- (1) The simplification of the issues
- (2) The necessity or desirability of amendments to the pleadings
- (3) The possibility of attaining admissions of fact and of documents which will avoid unnecessary proof
- (4) Such other matters as may aid in the disposition of the action.

Dated this 13th day of February, 1957.

SUMMERS, BUCEY & HOWARD,

/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 14, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

As a result of pre-trial conference heretofore conducted under and by direction of the Court herein, plaintiff was represented by its attorneys, Summers, Bucey & Howard, (Theodore A. LeGros of counsel); defendant was represented by its attorneys, Wright, Innis, Simon & Todd, (Arthur E. Simon of counsel); the parties with the approval of the Court approved of the following:

Admitted Facts

I.

The plaintiff United States Fidelity and Guaranty Company at all times material was and now is a corporation created and continued as such by and under the laws of the State of Maryland, of which it is a citizen and resident.

II.

The defendant Anderson Construction Co., Inc. at all times material was and now is a corporation created and continued as such by and under the laws of the State of Washington, of which it is a citizen and resident with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and duly authorized to engage in business as a surety within the State of Washington to which has heretofore been paid all prescribed fees.

IV.

This is a civil action in which the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

V.

That defendant signed and delivered to the plaintiff the latter's printed form of application applying for execution by plaintiff as surety of certain bonds to the United States of America in connection with a certain construction contract known as "DA 95-507-ENG-826 Elmendorf & Ladd A F B".

VI.

In connection with said signed printed application, the plaintiff executed on behalf of the defendant in favor of the United States of America two bonds, viz: a performance bond (Government Standard Form 25) in the sum of \$3,085,178.50 and a payment bond (Government Standard Form 25A) in the sum of \$2,500,000.00, and that on the back of one of said bonds appears a recital that the premium for said bonds was \$47,753.72 and that said bonds together with similar bonds executed by other members of the joint venture of which defendant was a member were delivered by and/or for the defendant and the other members of the joint venture by Islands Construction Co. as manager of said joint venture consisting of defendant corporation, Islands Construction Co. and Montin-Benson Corporation, and were received by and/or for the obligee, United States of America, on or before the 17th of June, 1955.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

That statements of account in the amount of \$47,753.72 were submitted to Islands Construction Co. as manager of the joint venture on account of the premium charged under dates of July 1, 1955, August 1, 1955, September 1, 1955, October 1, 1955, November 1, 1955, and December 1, 1955. That the

joint venture without protest paid on said account under date of September 19, 1955, the sum of \$11,938.43 and a like sum was similarly paid on account under date of October 21, 1955 which payments were properly credited.

IX.

That notification to defendant and others constituting the joint venture to proceed with performance under their construction contract identified as "DA 95-507-ENG-826 Elmendorf & Ladd A F B" was issued by or for the United States of America on the 17th of June, 1955.

X.

That the document (of which copy marked Exhibit a is attached hereto), being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the date of April 15, 1951, with respect to the bonds within the classification of the bonds involved in the above entitled action is genuine and that the amount of premium if calculated by using said rate for said bonds is \$47,753.72.

XI.

That the document (of which copy marked Exhibit b is attached hereto), being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington on the 5th of July, 1955, for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action is genuine and that the amount of premium if calculated

by applying the rates as specified in Exhibit b to said bonds is in the sum of \$35,576.79.

XII.

That the defendant on or about January 5, 1956, tendered to the defendant two checks, one being for \$2,805.73 and one being for \$8,894.20, amounting to \$11,699.93, which said tender was rejected by plaintiff and said checks were returned to defendant. That defendant has kept good its tender by depositing that amount with the clerk of the above entitled court on the 12th of July, 1956.

Plaintiff's Contentions

I.

That the written agreement dated June 3, 1955, was in all respects complete when signed and delivered by defendant and contains the joint and several promise of defendant and others to pay forthwith the premium for said bonds in the specified sum of \$47,753.72.

II.

The plaintiff, in engaging in its said business as a surety, in accepting said written agreement from the defendant and in executing said bonds at all times material was and is subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79) as amended, in consequence of provisions contained in §.01.04 and §.11.08 (4) thereof.

III.

Pursuant to the requirements of such Insurance

Code (§.19.04 and §.19.05) the plaintiff caused to be filed through a licensed rating organization in the office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on said bonds, which same having been accepted and approved by said Insurance Commissioner (§.19.06) became effective and binding as of the 30th day of April, 1951, and subsequently continued effective and binding until after the 20th day of July, 1955.

IV.

Said rates were applicable to the premium on said bonds and were effective and binding as to both the plaintiff and the defendant when the defendant became obligated upon said written agreement dated June 3, 1955 and when the plaintiff became obligated as surety upon said two bonds dated May 31, 1955, executed in favor of the United States of America, and also when the United States of America, after receiving and accepting the defendant's construction contract known as "DA-95-507-ENG-826 Elmendorf & Ladd A F B" with said bonds, authorized and directed the defendant to proceed with work thereunder on the 17th of June, 1955.

V.

The premium for said bonds in said sum of \$47,753.72, which the defendant promised to pay according to said written agreement, was rightly computed upon and correctly calculated at said premium rates then so effective and binding.

VI.

Said Insurance Code at all times material did and does contain mandates and prohibitions as follows:

“1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes.” (Section .19.04.)

“3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.” (Section .19.04.)

“1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.” (Section .19.05.)

“1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.” (Section .19.28.)

“Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance

contract, or any commission thereon or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” (Section .30.14.)

“Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate or premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. * * *” (Section .30.17.)

VII.

The premium for said bonds in said sum of \$47,753.72 was and is the only amount of premium legally chargeable by the plaintiff and legally payable by the defendant.

VIII.

That payments upon said premium following receipt by defendant and the other members of the joint venture of statements of account have been made aggregating \$23,876.86; that the balance of said premium remaining unpaid is in the sum of \$23,876.86 and that despite demand having been heretofore made for payment, the defendant and the other members of the joint venture have failed and refused to make payment of said unpaid balance for which it is legally obligated.

IX.

That statements of account having been submitted to defendant monthly commencing on or about July 1, 1955 and payments having been made thereon without protest, said account has become an account stated.

X.

That United States Fidelity and Guaranty Company neither directly by itself nor indirectly by any authorized agent agreed to take less than the legal rate of premium of \$47,753.72 for the said bonds.

Defendant's Contentions

I.

That the printed form of application hereinabove referred to in paragraph V of Admitted Facts was not complete when signed by Martin Anderson on behalf of the defendant and that certain typewritten portions thereof were filled in subsequent to the signing and delivery thereof to the plaintiff. That the amount of premium was in blank at the time of the signing of the said form of application by Martin Anderson and that the figures "47,753.72" which now appear in the said blank were inserted subsequent to such signing and delivery by a person or persons unknown to the defendant.

II.

That at or about the time said defendant signed the said form of application, J. C. Beeson, the agent who executed the said bonds on behalf of the plaintiff, represented to the defendant that the plaintiff

was about to reduce its premium rates to make the same competitive with non-board companies (whose rates were approximately 25% lower) and asserted that if the defendant would sign the application for execution of the said bonds by the plaintiff, the defendant would be given the benefit of such reduced rates.

III.

That having authorized the said J. C. Beeson to solicit the said application and having authorized the said J. C. Beeson to sign the said bonds as Attorney in Fact for the said plaintiff and to deliver the same to the said defendant and having received and retained payments of the premium on the said bonds from McCollister and Company and/or the said J. C. Beeson, said plaintiff is estopped to deny the authority of the said J. C. Beeson to make the aforesaid oral contract on its behalf with the defendant.

IV.

That the oral contract referred to in the next preceding paragraph was and is a binding contract between the plaintiff and the defendant under the laws of the State of Washington and that the same was not and is not rendered void by any provisions of the Insurance Code of the State of Washington.

V.

That until this time the plaintiff has not by any appropriate pleading stated a cause of action for an account stated. That no statements of account were rendered by plaintiff to this defendant, other

than the statements sent by McCollister and Company to Islands Construction Co. as hereinabove set forth in paragraph VIII of the Admitted Facts; that the said statements were regarded by both McCollister and Company and the managers of the joint venture as pro forma only. That in a letter to Islands Construction Co. dated September 14, 1955 McCollister and Company stated that the amount due for the said bonds was \$35,815.29 and that the said amount was payable in three equal installments. That the two payments referred to in said paragraph VIII were made pursuant to the said letter by the joint venture.

VI.

That defendant sometime in October, 1955 for the first time became aware that the rate at which the pro forma statements for premiums due were being billed to the joint venture was an improper rate and promptly thereupon made inquiry and protest.

VII.

That the correct total premium due plaintiff for the execution of the said bonds was and is the sum of \$35,576.79; that plaintiff acknowledges receipt on account of the premium payment by or for the account of defendant of a total of \$23,876.86. That the balance of \$11,699.93 was duly tendered to agents of the plaintiff prior to the institution of this suit and that said tender was kept good at all times and the said amount is now on deposit with the clerk of this court pursuant thereto.

VIII.

That defendant has caused to be paid or tendered to plaintiff all sums due from said defendant to plaintiff herein and said defendant is entitled to a judgment of dismissal with prejudice and with its costs to be taxed.

Issues of Fact

The following are the issues of fact which will be determined by the jury herein.

I.

By signing the said printed application, did defendant become obligated to pay a premium of \$47,753.72.

II.

Did the printed application when signed by the defendant contain the figures \$47,753.72 as the amount of the premium.

III.

Did J. C. Beeson agree to give the defendant the benefit of the reduction in rates then contemplated by plaintiff.

IV.

Is the unpaid balance on the obligation to pay premium in the sum of \$23,876.86.

V.

Has plaintiff through its agents contracted to accept any lesser sum.

VI.

Is defendant obligated to the plaintiff on an ac-

count stated in the sum of \$47,753.72 less credit for payments made of \$23,876.86.

Issue of Law

The following issue of law is to be determined by the court:

I.

If there existed a contract to accept a premium in an amount less than \$47,753.72, is such contract valid under the laws of this state.

Exhibits

The exhibits of all parties below listed were produced and marked and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. All parties agree that exhibits listed below may be admitted subject only to objections of materiality or relevancy.

Plaintiff's Exhibits

Exhibit a. Premium rate schedule filed for effect after April 30, 1951.

Exhibit b. Premium rate schedule filed for effect after July 20, 1955.

Exhibit c. Photostatic copy of performance bond (Government Standard 25) of each of the joint ventures.

Exhibit d. Photostatic copy of payment bond (Government Standard 25A) of each of the joint ventures.

Exhibit e. Statements of account and cancelled checks.

Defendant's Exhibits

Exhibit f. Letter dated September 14, 1955 from McCollister Co. to Islands Construction Co.

The foregoing pre-trial order has been approved by the parties herein as evidenced by the signatures of their counsel, and this order is hereby entered as a result of which the pleadings are accordingly amended.

Done in open Court this 9th day of May, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved by:

/s/ DOUGLAS SHAW PALMER,
Of Attorneys for Defendant.

Prepared, presented and approved by:

/s/ THEODORE A. LeGROS,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 9, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

Comes now the plaintiff and respectfully requests the Court to instruct the jury as follows:

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Instruction No. —

It is the duty of the court to instruct you as to

the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole, and not pick out any particular instruction and place undue emphasis on such instruction.

While the court may have made some remarks or comment during the trial of this case, it has not done so with the idea of influencing your verdict.

You will disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the court, and any evidence which after the admission was stricken by the court.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

Instruction No. —

The party alleging in the pretrial order any material fact or contention has the burden of proof to establish such fact or contention by a fair pre-

ponderance of all the evidence. It is not essential that it be established by evidence introduced by the party having such burden of proof, but it may be established in whole or in part by evidence introduced by the opposite party.

Instruction No. —

By the term “burden of proof” is meant the obligation to prove or establish a fact by a fair preponderance of the evidence.

By the term “preponderance of the evidence” is meant that evidence on a particular matter which, when fairly, fully, and impartially considered by you, has greater weight with you, produces a stronger impression, and is more convincing to you as to its truth than that to which it is opposed; and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who may have testified for one party or the other regarding such matter.

Instruction No. —

You shall draw no inference from the asking of a question to which an objection has been sustained and shall disregard entirely any evidence that has been stricken by the court. Likewise, you shall wholly disregard all remarks or argument made by attorneys for either side which are not supported and justified by evidence admitted at the trial by the court.

Instruction No. —

You are the sole and exclusive judges of the facts

and of the degree of credit to be given to the testimony of the different witnesses who have testified before you. In weighing their testimony it will be your duty to consider their demeanor upon the witness stand, their manner of testifying, their apparent candor and fairness or lack of it, and interest or lack of interest in the result of the trial, the opportunities they have had for ascertaining and knowing the facts with reference to which they have testified, and from all the facts and circumstances it is your duty to give what you consider the proper weight to the testimony of each and every witness who has testified before you.

If you should be satisfied that any witness has knowingly testified falsely to any material matter in this case, you have the right to reject the whole of the testimony of such witness, unless corroborated by other credible evidence or by facts and circumstances proven.

Instruction No. —

It is the duty of the jurors to deliberate and consult together with a view to reaching an agreement if they can without violence to their individual judgment upon the evidence and under the instructions of the court. Each juror must decide the case for himself, but should do so only after consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinion on the case when convinced that they are erroneous. If any of your number should conscientiously believe that after an entire consideration with the

other jurors of all the testimony in the case and the instructions of the court, that the verdict should be for a particular party to the action, then such juror should so vote; and if any of your number should likewise conscientiously believe, after such consideration, that the verdict should be for the other party to the action, then such juror should so vote; but no juror should vote for either party nor be influenced in so voting for the single reason that a majority of the jury should be in favor of such party. In other words, despite your duty to agree, if possible, no juror should surrender his honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict for or against either party solely because of the opinions of the other jurors.

Instruction No. —

You are instructed that a joint-venture is treated at law as a form of partnership and that each member of the joint-venture is bound by the acts of the other member or members done within the scope of the joint-venture.

Instruction No. —

If you find that the amount of \$47,753.72 was inserted in the application form signed by the defendant at the time the defendant signed said form, your verdict will be for the plaintiff in the amount prayed.

Instruction No. —

You are instructed that if you find from the fair preponderance of the evidence that statements of

accounts were submitted to the defendant and/or the joint-venture, of which it was a member, on June 16, 1955 and on the first of each subsequent month and that defendant, or said joint venture failed to make any protest or objection to said statements of account for several months, and if you further find that payments on account were made on September 19, 1955 and October 21, 1955 then you are instructed that the account rendered has become a stated account and you must find for the plaintiff and against the defendant in the amount claimed by the plaintiff.

Instruction No. —

You are instructed that if you find from a fair preponderance of the evidence that United States Fidelity and Guaranty Company had filed a schedule of premium rates with the Insurance Commissioner of the State of Washington and that the premium charged defendant and the joint-venture members of which defendant was a member, was calculated at the rate which was in force when the bonds became effective, and if you further find that no other rate was applicable, then you will find for the plaintiff in the amount prayed.

Instruction No. —

You are instructed that if you find that United States Fidelity and Guaranty Company had never given McCollister & Company or J. C. Beeson as agents the express authority to accept application for surety bonds at an agreed premium rate less

than that legally set by the Insurance Commissioner and if you find that no apparent authority was given for such an agreement, and you further find that such agreement was specifically prohibited by the terms of the Insurance Code of the State of Washington, then any such agreement, if one was made, was wholly without the agency authority of McCollister & Company or J. C. Beeson and would not be binding upon United States Fidelity and Guaranty Company and you will find for plaintiff in the amount prayed.

Instruction No. —

You are instructed that a principal is only responsible for the acts of his agent performed within the scope of its authority and that to hold the principal to such responsibility a third party in dealing with the agent must ascertain its authority and know that said agent is acting within its apparent scope.

Instruction No. —

You are instructed that every one is presumed to know the public law of his State with which he must comply.

Instruction No. —

You are instructed that, under the laws of the State of Washington, insurance is defined as follows:

“Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.”

This definition, therefore, includes the execution

of a bond or bonds such as were executed in this case.

Instruction No. —

You are instructed that the Insurance Code of the State of Washington is a public law of said State and provides:

Section .19.04 Filing Required:

“1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes.

* * * * *

“3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.” (Cf. R.C.W. 48.19.040)

Section .19.05 Filings by Bureau:

“1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.” (Cf R.C.W. 48.19.05)

Section .19.28 Deviations:

“1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom

except as provided in this section.” (CF R. C. W. 48.19.280)

Section .19.43 Penalties:

“Any person violating any provision of this article shall be subject to a penalty of not more than fifty dollars (\$50) for each such violation, but if such violation is found to be willful a penalty of not more than five hundred dollars (\$500) for each such violation may be imposed. Such penalties may be in addition to any other penalty provided by law. (Cf. R.C.W. 48.19.430)

Section .30.14 Rebates:

“1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” (Cf. R.C.W. 48.30.140)

Section .30.16 License Revocation for Rebates:

“The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker, or solicitor guilty of violating any provision contained in sections .30.14 and .30.15.

No such insurer, general agent, agent, broker, or solicitor shall, following any such revocation, be eligible for a certificate of authority or license within one (1) year after such revocation." (Cf. R.C.W. 48.30.150)

Section .30.17 Receiving Rebates:

"1. No insured person shall receive or accept directly or indirectly, any rebate or premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. * * * " (CF. R.C.W. 48.30.170)

Acknowledgment of Service Attached.

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant Anderson Construction Co. requests the court to give to the jury the following instruction:

Instruction No. —

The plaintiff United States Fidelity and Guaranty Company is suing the defendant Anderson Construction Co. to recover the balance alleged to be due the plaintiff on the premium for furnishing a performance bond and a payment bond to the

United States Government for the defendant. The plaintiff claims that the unpaid balance of this premium is \$23,876.86. The defendant claims that the unpaid balance of this premium is \$11,699.93, which it has tendered to plaintiff and paid into court.

The defendant Anderson Construction Co. is in the construction business. In 1955 it formed a joint venture with two other companies, Islands Construction Co. and Montin-Benson Co., to bid upon a contract with the United States for certain construction work upon an air force base in Alaska. This bid was accepted by the United States. In order to do the work, however, the members of the joint venture had to furnish the United States with a performance bond, guaranteeing payment to the government if they failed to perform their contract, and also a payment bond, guaranteeing their payment of all claims for material and labor in connection with the project.

The plaintiff is a commercial insurance company in the business of furnishing such bonds for a fee. In about May 1955, when the joint venture was bidding on the government contract, the defendant applied to the plaintiff for the execution of a performance bond and a payment bond required by the government. This application was handled for the plaintiff by McCollister and Company, insurance brokers, and by J. C. Beeson, vice president of McCollister and Company. The McCollister Company furnished the defendant with plaintiff's printed

form of application for such bonds, and the defendant through its officers signed the application and delivered it to McCollister and Company for the plaintiff. Thereafter, in June 1955, the plaintiff executed the two bonds through J. C. Beeson, as its attorney-in-fact. The bonds were delivered to the United States about June 17, 1955. These bonds are still in effect. On the back of one of the bonds is a recital that the premium paid for both bonds was \$47,753.72. At the time the defendant applied for the bonds and at the time they were executed by the plaintiff, the plaintiff had on file with the Insurance Commissioner of the state of Washington its schedule of premium rates for such bonds. If calculated according to the rates then on file, the premium on these bonds would be \$47,753.72. On July 5, 1955 the plaintiff caused new reduced premium rates to be filed with the Insurance Commissioner of the state of Washington, which became effective on July 20, 1955. If calculated according to these new reduced rates, the premium for the bonds furnished by the plaintiff would be \$35,576.79.

Instruction No. —

The plaintiff contends that when the defendant signed and delivered its printed form of application to the plaintiff through J. C. Beeson, of McCollister and Company, the application was complete in all respects and set forth in the appropriate space on the form a premium of \$47,753.72 for the bonds. If you find this to be true, you should return a verdict for the plaintiff.

The defendant contends, on the other hand, that the printed form of application which it signed was not complete when delivered to the plaintiff through J. C. Beeson, but that the space in the printed form for the insertion of a premium was intentionally left blank; that Mr. Beeson represented to the defendant that the plaintiff was then in the process of reducing its premium rates for such bonds; that this reduction in rates would be made shortly; and that if the defendant would sign the application with the premium left blank, it would get the benefit of these reduced rates. If you find this to be true, you should return a verdict for the defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 14, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S ADDITIONAL REQUESTED
INSTRUCTIONS

Comes now the plaintiff and submitting the following additional instructions requests that they be given the jury in addition to those previously submitted.

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Instruction No. —

You are instructed to return a verdict in favor of the plaintiff and against the defendant in the amount prayed.

Instruction No. ———

You are instructed that plaintiff in engaging in its business as a surety and in executing said bonds, was and is subject to the Insurance Code of the State of Washington as then in force.

Instruction No. ———

You are instructed that pursuant to the requirements of such insurance code, plaintiff caused to be filed through a licensed rating organization in the Office of the Insurance Commissioner of the State of Washington its certain rates as applicable to the premium on the bonds in question and that on the basis of the rates in force at the time said bonds became effective, the only rate plaintiff was lawfully entitled to charge the defendant for the said bonds was the sum of \$47,753.72.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant Anderson Construction Co. requests the court to give to the jury the following instruction:

Instruction No. 3

The plaintiff contends that the defendant is liable for a total premium of \$47,753.72 on the basis of an account stated between the plaintiff and defendant.

An account stated is an agreement between parties who have had previous monetary transactions that all the items of account representing such transaction, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance. The rendering of an account by one party to another is not alone sufficient to make it an account stated. The crucial factor is whether the parties intended to agree upon the account rendered. On one hand, there must be evidence to show that the party sought to be charged has by his language or conduct admitted the correctness of the account. If a person receiving an account keeps it beyond a reasonable time, or makes payment upon it, without objecting to its accuracy, this may be evidence of his admission that the account is correct. On the other hand a person receiving an account does not admit its correctness, even though he keeps it without protest, where he has no knowledge or opportunity for knowledge of all the circumstances concerning the account, or where the account is at variance with a special contract between the parties.

Authority for Instruction:

Austin v. Union Lumber Co. 95 Wash. 608, 610-11 (1917);

1 C. J., Accounts and Accounting, Secs. 249, 251, 264, 276, 289.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 16, 1957.

[Title of District Court and Cause.]

DEFENDANT'S ADDITIONAL REQUEST

Defendant requests that the Court in charge of the jury herein give the attached instruction.

WRIGHT, INNIS, SIMON & TODD,
Attorneys for defendant.

Instruction No. —

The Insurance Code of the State of Washington contains the following provision:

“R.C.W. 48.19.020 Rate Standard. Premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory. * * *.”

Acknowledgment of Service Attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

VERDICT FOR DEFENDANT

We, The Jury In The Above-Entitled Cause,
Find for the defendant.

/s/ GORDON R. NEWELL,
Foreman.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR AN ORDER GRANTING PLAINTIFF A NEW TRIAL

Comes Now the plaintiff and respectfully moves the court for an order in the above entitled cause setting aside the verdict of the jury and the judgment entered thereon and for an order in accordance with plaintiff's request for a directed verdict. This motion is based upon the following grounds:

(1) That all of the evidence before the jury established the existence in law and fact of an "account stated" upon which plaintiff is entitled to recover.

(2) That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc. was ever given any express authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defendant would pay less than the legal premium for the bonds involved.

(3) That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc. was ever given any apparent authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defend-

ant would pay less than the legal premium for the bonds involved.

(4) That all of the evidence before the jury established that United States Fidelity and Guaranty Company gave no authority express or apparent to J. C. Beeson or McCollister & Company, Inc. to enter into any contract giving defendant any premium rate other than that established by law.

In the alternative plaintiff moves for a new trial upon the following grounds:

(1) Error in law in that the court did overrule plaintiff's exception made to the affirmative defense of the defendant.

(2) Error in instructing the jury in that the court (a) failed to give plaintiff's requested instructions as to a directed verdict, and (b) instructed the jury that such special agreement as was alleged would not be void, and (c) instructed the jury that if such special agreement was made the verdict should be for the defendant.

SUMMERS, BUCEY & HOWARD,

/s/ By THEODORE A. LeGROS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 25, 1957.

United States District Court for the Western
District of Washington, Northern Division

Civil Action No. 4093

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Plaintiff,

vs.

ANDERSON CONSTRUCTION CO., INC., a
corporation, Defendant.

ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
AND FOR A NEW TRIAL

Be it Remembered that the above cause came on for hearing before the Honorable John C. Bowen, sitting with a jury, on May 14, 1957, and the said trial was continued from day to day until May 17, 1957, when the verdict of the jury was duly and regularly returned in favor of the defendant, Anderson Construction Co., Inc., a corporation, and judgment upon the said verdict was forthwith entered by the Clerk pursuant to Rule 58 of the Rules of Civil Procedure for the District Courts of the United States; and thereafter plaintiff, United States Fidelity and Guaranty Company, a corporation, on May 25, 1957, duly and regularly served and filed herein its Motion for Judgment Notwithstanding the Verdict, or in the alternative for an

Order Granting Plaintiff a New Trial, and the said motion came on duly and regularly for hearing on June 10, 1957 before Honorable John C. Bowen, one of the Judges of the above Court, plaintiff being represented by its attorneys, Summers, Bucey & Howard and Theodore A. LeGros, and the defendant being represented by its attorneys, Wright, Innis, Simon & Todd and Arthur E. Simon; and the Court having heard the argument of counsel and being in all things fully advised, and having announced the decision of the Court denying the said motion of the plaintiff for judgment notwithstanding the verdict, and also denying the alternative motion of the said plaintiff for a new trial; and the said plaintiff having requested the entry of a formal order in the premises, Now, Therefore, it is by the Court

Ordered, that the motion of United States Fidelity and Guaranty Company, a corporation, plaintiff above named, for judgment notwithstanding the verdict, or in the alternative for an order granting a new trial herein, be and the same is hereby in all respects denied.

Done in Open Court this 17th day of June, 1957.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ DOUGLAS SHAW PALMER,

WRIGHT, INNIS, SIMON & TODD,
Attorneys for Defendant.

Approved as to form and Notice of Presentation
waived.

/s/ THEODORE A. LeGROS,
SUMMERS, BUCEY & HOWARD,
Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United States Fidelity and Guaranty Company, a corporation, plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 17th day of May, 1957.

SUMMERS, BUCEY & HOWARD,
/s/ By THEODORE A. LeGROS,
Attorneys for Appellant United States Fidelity and
Guaranty Company, a corporation.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents, that we, United States Fidelity & Guaranty Company, and Maryland Casualty Company, a corporation of the State of Maryland, authorized to become sole surety

on bonds in the State of Washington, as Surety, are held and firmly bound unto Anderson Construction Co., Inc., Defendant above named, as Obligee, in the penal sum of Two Hundred Fifty and No/100ths (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated This 16th day of July, 1957.

Whereas, on the 17th day of May, 1957, the above entitled Court rendered and entered a judgment or decree in the above entitled cause in favor of the above named Defendant.

And Whereas, said United States Fidelity & Guaranty Co., Plaintiff, feeling aggrieved by said judgment or decree and desiring to appeal from the same to the Circuit Court of Appeals of the United States of America and perfect said appeal by this bond;

Now, Therefore, The Condition of the Above Obligation Is Such; That if the said appellant will pay all costs and damages that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100ths (\$250.00) Dollars, then this obligation shall be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY &
GUARANTY CO.,

/s/ By THEODORE A. LeGROS,

Its Attorney

Principal.

[Seal] MARYLAND CASUALTY COM-
PANY,

/s/ By W. W. DIETZ,
Attorney-In-Fact.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

ORDER AS TO EXHIBITS

On ex parte motion of appellant, it is hereby ordered and directed that as a part of the record on appeal in the above entitled action, the clerk of the above entitled court shall transmit to the United States Court of Appeals for the Ninth Circuit the original of all exhibits as designated, either by the appellant or by the appellee.

Done in open court this 19th day of August, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved and presented by:

SUMMERS, BUCEY & HOWARD,
/s/ RICHARD W. BUCHANAN,
Attorneys for Appellant.

Approved as to form and notice of presentation
waived:

WRIGHT, ENNIS, SIMON & TODD,
/s/ ARTHUR E. SIMON,
Attorneys for Appellee.

[Endorsed]: Filed Aug. 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP, I am transmitting herewith the following original documents in the file dealing with the above action, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Feb. 21, 1956, with exhibits A, B and C attached.
2. Summons with Marshal's Return, filed Feb. 23, 1956.
3. Answer, filed July 12, 1956.
4. Stipulation and Order Regarding Tender into Court, filed 7/12/56.
5. Plaintiff's Motion for Leave to Amend its Complaint, filed Aug. 17, 1956.
6. Note for Motion Calendar, filed Aug. 20, 1956.
7. Plaintiff's Reply, filed Sept. 21, 1956.
8. Plaintiff's Request for Admissions by Defendant, filed 9/21/56, with Exhibits 1 and 2 attached.
9. Demand for Jury Trial, filed Sept. 26, 1956.

10. Request for Admissions, filed 9/26/56.

11. Response to Request for Admissions, filed 9/26/56.

12. Plaintiff's Motion for Order Relative to Defendant's Response to Request for Admissions, filed Oct. 3, 1956.

13. Note for Motion calendar, filed 10/3/56.

14. Plaintiff's Memorandum of Authorities in Support of Motion to Strike or Compel Direct Responses, filed 10/5/56.

15. Defendant's Reply Memo. in Opposition to Plaintiff's Motion to Strike or Compel Direct Responses, filed 10/5/56.

16. Response to Request for Admissions, filed 10/8/56.

17. Plaintiff's Objections to Defendant's Request for Admissions, filed 10/8/56.

18. Notice of Hearing, filed 10/8/56.

19. Plaintiff's Memorandum Brief on Objections to Defendant's Requests for Admissions, filed Oct. 11, 1956.

20. Defendant's Memorandum in Opposition to Plaintiff's Objections to Defendant's request for Admissions, filed Oct. 12, 1956.

21. Order on Plaintiff's Objections to Defendant's Request for Admissions, filed Oct. 16, 1956.

22. Plaintiff's Responses to Defendant's Requests for Admissions, filed 10/24/56.

23. Plaintiff's Responses to Defendant's Requests for Admissions, filed 10/24/56.

24. Deposition of William V. Montin, filed 2/4/57.

25. Plaintiff's Request for Pre-Trial hearing, filed 2/14/57.

26. Notice of Hearing upon Request for Pre-Trial conference, filed 2/14/57.

27. Praecipe, plaintiff, for 10 subpoenas in blank, filed 5/6/57.

28. Pre-Trial Order, filed 5/9/57.

29. Deposition of Martin Anderson, filed 4/23/57.

30. Deposition of V. J. Oja, filed 5/10/57.

31. Deposition of L. E. Baldwin, filed 5/10/57.

32. Plaintiff's Requested Instructions, filed 5/14/57.

33. Defendant's Requested Instructions, filed 5/14/57.

34. Plaintiff's Trial Brief, filed 5/14/57.

35. Defendant's Memorandum of Authorities, filed 5/14/57.

36. Defendant's Memorandum of Authorities, filed 5/14/57.

37. Plaintiff's Additional Requested Instructions, filed 5/15/57.

38. Defendant's Requested Instructions, filed 5/16/57.

39. Defendant's Additional Request for Instruction, filed 5/17/57.

40. Verdict for Defendant, filed 5/17/57.

41. Marshal's returns on Subpoenas, Anderson, et al, filed 5/22/57.

42. Motion for Judgment NOV or for New Trial, filed 5/25/57.

43. Order Denying Motion for Judgment Not-

withstanding the Verdict and for a new trial, filed June 17, 1957.

44. Notice of Appeal, filed July 16, 1957.

45. Cost Bond on Appeal, filed July 16, 1957 (\$250.00, USF & G Co.).

46. Appellant's Designation of Record on Appeal, filed Aug. 19, 1957.

47. Statement of Facts. (Court Reporter's Transcript of Proceedings), filed August 19, 1957.

48. Order transmitting exhibits as designated as part of record, on appeal, filed Aug. 19, 1957.

Plaintiff's Exhibits numbered 1 to 13 inclusive, and No. 15.

Defendant's Exhibits A-1 to A-4 inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit:

Filing Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 19th day of August, 1957.

[Seal] MILLARD P. THOMAS,
 Clerk,

/s/ By TRUMAN EGGER,
 Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4093

UNITED STATES FIDELITY & GUARANTY
CO., a corporation, Plaintiff,

vs.

ANDERSON CONSTRUCTION CO., INC., a cor-
poration, Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the above-entitled and numbered cause was heard before the Honorable John C. Bowen, one of the Judges of the above-entitled Court, and a jury, beginning Tuesday, May 14, 1957, at 10:25 o'clock a.m.

The plaintiff was represented by Mr. Theodore A. LeGros, of Messrs. Summers, Bucey & Howard, Attorneys at Law.

The defendant was represented by Mr. Arthur E. Simon and Mr. Douglas Palmer, of Messrs. Wright, Innis, Simon & Todd, Attorneys at Law.

Whereupon, the following proceedings were had and done, to-wit: [1]*

The Court: I ask if the parties and Counsel are ready to proceed with the trial of the case entitled

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

United States Fidelity & Guaranty Co., a corporation, versus Anderson Construction Company, a corporation, No. 4093.

Mr. LeGros: The plaintiff is ready, your Honor.

The Court: I ask the clerk to call a jury into the jury box to try that case.

(Thereupon, the empaneling of a jury was begun, and continued until 12:00 o'clock noon, at which time the following proceedings were had):

The Court: I would like to advise Mr. Swanson and Mr. Erlingsen that when we take the next recess, which will be during the noon hour, that you are excused and may go about your business as if you had not been asked to come here today, subject to the Court's later notification to you sometime in the future after today, I do not know when, to render further jury service.

All other jurors now in this courtroom except those two, and including particularly the jurors now [2] in the spectator seats other than Mr. Swanson and Mr. Erlingsen, and each and every juror now in the jury box, are excused during the noon hour until 2:30 o'clock this afternoon.

During that time the Court strictly admonishes you not to discuss this case among yourselves, do not discuss it with anyone else, avoid conversations with the parties and their Counsel and with the witnesses in the case, avoid all contacts with strangers and do not discuss this case with anyone. Do not permit anyone to discuss it with you.

That applies to you yourselves. Do not discuss

this case among yourselves. Just forget all about this case until and unless the Court later on makes some amending or different order.

And the jurors every time after coming to the jury box and unless the Court advises you otherwise will on the occasion of every recess when the jurors are absent from the jury box and/or the jury room will refrain from discussing this case and will refrain from permitting others to discuss it with you, and apply these admonitions to all of your conduct.

Be sure not to read anything in the newspapers about it and do not listen to any statements over the radio or television about it. Be certain to [3] have this in mind.

I ask the jurors now in the courtroom and those in the jury box to now retire for the noon hour until 2:30. Be back here promptly at that time. This does not include Mr. Swanson and Mr. Erlingsen. They are excused subject to later call.

Each and all of the jurors will have the opportunity first to leave the courtroom and use the elevators.

Each juror now in the jury box will return to the *respect* seat in the jury box which you now occupy when you return after lunch. Be sure that you return to the same juror's seat in the jury box which you now occupy.

And as to Mr. Rogers, further inquiries will be made of him after the resumption of the court session at 2:30. The Court has some other duties to perform in the meantime.

I ask all others in the courtroom other than the jurors to kindly wait until these jurors have the first opportunity of using the elevators to leave the courthouse.

The jurors will now retire.

(The prospective jurors left the courtroom.)

The Court: The Court will welcome the requested instructions from each side as soon as you may conveniently give them after the jury is sworn.

Counsel are excused and the court is now recessed until 2:30.

(Thereupon, at 12:05 o'clock p.m. a recess herein was had until 2:30 o'clock p.m.)

Tuesday, May 14, 1957. 2:30 O'Clock P.M.

(All parties present as before.)

The Court: May it be stipulated by and between Counsel that each one and all of the jurors who were in the jury box at the call of the last recess has returned to the seat occupied by each one of the jurors respectively and that each and all of such jurors then in the jury box are now present?

Mr. LeGros: It is so stipulated.

Mr. Simon: The defendant will so stipulate.

The Court: And that all parties on trial with their Counsel are either present or represented [5] by their Counsel?

Mr. LeGros: Yes, your Honor.

Mr. Simon: The defendant so stipulates.

The Court: I wish now to resume the interrogation and qualifying of the jurors, and I wish now to direct some inquiries to Mr. Rogers.

(Thereupon, the empaneling of the jury was continued.)

The Court: Confined to Mr. Rogers the defendant may now exercise its second peremptory challenge.

Mr. Simon: If the Court please, the defendant continues to be satisfied with the jury as now constituted.

The Court: And do you accept the jury as now constituted?

Mr. Simon: We do, your Honor.

The Court: The plaintiff may now exercise its third and last peremptory challenge.

Mr. LeGros: If the Court please, the plaintiff will now accept the jury as constituted.

The Court: I would like to ask, before the Court finally acts upon Counsel's last statements, if there is anyone among the jurors now in the jury box who is aware of any condition in your health or in the [6] health of some member of your household which gives you any particular concern at this time. If so, will you hold up your right hand?

(No response.)

The Court: Does any one of you take daily relief from or receive any care for diabetes?

(No response.)

The Court: Does anyone of you know of any heart affliction or any other organic trouble that might conceivably be worsened by your jury service including, among other things, the going up and down what I would call a short flight of stairs to the jury room?

(No response.)

The Court: Does any one of you know of any health reasons why you should not act as jurors?

(No response.)

The Court: Hearing none, I ask each and all of the jurors now in the jury box, all of whom have been accepted by Counsel on both sides as the jury to try this case, to now rise and be sworn as such jury.

(Thereupon, the jury was sworn by the clerk of court at 2:38 o'clock p.m.) [7]

The Court: What is the attitude of Counsel respecting whether the length of this trial is such as to call for the empaneling of alternate jurors, one or more?

Mr. LeGros: If the Court please, I cannot anticipate that this case will take longer than today and tomorrow to try.

The Court: What is the attitude of defendant's Counsel?

Mr. Simon: I have no reason to disagree with my friend in that respect.

The Court: And do you feel that there is any reasonable necessity for alternate jurors?

Mr. Simon: I should say not, your Honor.

The Court: The Court will not empanel alternate jurors, and all of the other jurors now present will not be needed longer in this case, and I wish to thank each and all of you, and I include all of those in the jury box, for their very unselfish response to the Court's call for jury service and the

assistance of jurors. You are now excused, all of the jurors present except those in the jury box.

The Court: I ask the jurors in the jury box today and on all future days when you attend this court as jurors, be sure to report your attendance at the [8] Clerk's office on the third floor.

We have reached the stage in the trial now where it is appropriate for Counsel on each side, if they wish to do so, to make what we call an opening statement.

This opening statement is not evidence and it must not be so regarded by the jury. It is a mere outline, an advance outline predictive statement where Counsel lets the jury and the Court know what Counsel at this stage honestly think the jury will receive as evidence during this trial. It is not evidence, it is not testimony by Counsel, it is not argument, and Counsel should not argue or make any comment on the probative effect of any part of the evidence. It is just what I have said, merely a brief outline of the evidence so that the jury can know better what to expect in the way of evidence, and so far as what it proves or what it does not prove or what it establishes or what it is good for, there is no need of any comment about that. We will hear that type of argument later on during the trial.

Neither Counsel is required to make such an opening statement but each will in proper order, giving the first opportunity to the plaintiff, have that opportunity now. [9]

It is possible that defendant might, if he chooses,

reserve that opportunity until some later proper stage in the trial.

While making that statement at this time each Counsel may take any position in the courtroom most agreeable to Counsel who is making the statement.

At this time we will hear plaintiff's opening statement.

(Thereupon, Mr. LeGros made an opening statement in behalf of plaintiff to the Court and jury.)

The Court: At this time or later on at some proper stage of the trial defendant's Counsel may make defendant's opening statement.

(Thereupon, Mr. Simon made an opening statement in behalf of defendant to the Court and jury.)

The Court: At this time the plaintiff may proceed with the plaintiff's case in chief.

Mr. LeGros: Call Mr. Anderson as an adverse witness.

The Court: Come forward, Mr. Anderson, and be sworn as an adverse witness. [10]

MARTIN ANDERSON

called as an adverse witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Will you state your name in full, please? A. Martin Anderson.

Q. Where do you reside, Mr. Anderson?

(Testimony of Martin Anderson.)

A. Seattle, Washington.

Q. And your street address, please?

A. Marion and Fourth Avenue.

Q. Do you live at the Rainier Club?

A. Right.

Q. How long have you been in the construction business, Mr. Anderson?

A. Approximately thirty years.

Q. During that time approximately how many fidelity bonds have you obtained from either U.S.F. & G. or others in the field?

A. Oh, I would be guessing somewhat. Probably fifty.

Q. Is that on the low side? A. Probably.

Q. On the occasion in 1955 when you became interested in bidding on the so-called Elmendorf and Ladd Air Force Base job, when was it that you first became aware that [11] that project was up for bids?

A. Sometime in April of 1955, I think.

Q. Did you or someone else from your organization first approach the others in this joint venture with the idea of jointly bidding on this job?

A. Yes.

Q. I'm trying to get at with whom did the idea of a joint venture originate.

A. I think it originated with Mr. Baldwin.

Q. With Mr. Baldwin?

The Court: Who is he, Mr. Anderson?

A. He's president of Islands Construction Company.

(Testimony of Martin Anderson.)

The Court: Did you say, and if not will you now say, what your corporate capacity with the defendant Anderson Construction Company is? What is your corporate relationship, your corporate position, the office in the corporation?

A. I'm president of the company.

Q. (By Mr. LeGros): How long has Anderson Construction Company been incorporated?

A. I think it was 1948.

Q. And who were your officers in 1955?

A. Myself, Willard Wright and Raymond Wright.

Q. Those are two members of the law firm with which Mr. [12] Simon is associated? A. Yes.

Q. And how about Miss Galbraith?

A. She was assistant secretary.

Q. She was assistant secretary? A. Yes.

Q. Now, Mr. Anderson, handing you what has been marked as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 1.

(A bid bond application was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. LeGros): ——1, handing you Plaintiff's Exhibit 1, I wish you would examine that document. Directing your attention to the third printed page, do you find your signature on that page? A. Yes.

Q. And is that your signature? A. Yes.

Q. And it's signed "Martin Anderson, President?" A. Yes.

(Testimony of Martin Anderson.)

Q. That's under "Anderson Construction Company, Inc.?" A. Yes.

Q. And did you sign that document?

A. Yes.

Q. And what is the date of that document, please? [13]

Mr. Simon: I object to that as calling for the contents of an instrument not admitted in evidence. I assume—unless he is inquiring as to the date on which it was signed by Mr. Anderson.

The Court: That objection is sustained. You may ask him the latter question if you wish.

Q. (By Mr. LeGros): When did you sign this application, please?

A. I do not remember the exact date, but it was signed sometimes prior to May 25, 1955.

The Court: Does that exhibit have a name by which it is usually called in your business? If so, state it.

A. You mean this?

The Court: Yes, that Plaintiff's Exhibit 1 for identification. What kind of a paper is it, is what I mean by my question.

A. Here it says, "Contract Application." We usually call——

The Court: Is that what you call it, or is that—I want to know what you call it. What kind of a name would you attribute to that paper?

A. We usually call it a bid bond application.

The Court: You may inquire. [14]

Q. (By Mr. LeGros): Now, do you recall my

(Testimony of Martin Anderson.)

asking you the same question at the time your oral deposition was taken on April the 23rd, 1957?

A. I do not recall that the question was the same.

Q. Specifically referring to your deposition on Page 13, Line 4, do you recall at that time, Mr. Anderson, that you were under oath? A. Yes.

Q. And I asked you this question:

“Q. Do you recall or do your records indicate the date upon which the application form was signed by you?

“A. The date it was signed?

“Q. Yes.

“A. No, I don't recall the date it was signed.

“Q. Can you tell us about when it was signed?

“A. Oh, I would say it would be the latter part of May or early June.”

Now, is your testimony different on this occasion than it was on that?

Mr. Simon: I object to that as not proper, not a proper question.

The Court: The objection is overruled. [15]

A. If I understand it right, if it was signed prior to the 25th of May, it could still be in the latter part of May.

Q. (By Mr. LeGros): How about this: “* * * the latter part of May or early June?”

A. Well, I didn't have the dates too well memorized.

Q. You're not sure, in other words?

(Testimony of Martin Anderson.)

A. I am sure for this reason, if I may explain it——

The Court: You may do so, Mr. Anderson.

A. The job was bid on the 25th day of May, if my memory serves me right, and the bonding company are usually very zealous to have our name on that bid bond application prior to the time the job is bid. That's why I am sure it was signed prior to the 25th of May.

Q. (By Mr. LeGros): You mean you weren't sure on April the 23rd but you are sure now?

A. Because I've refreshed myself on the dates a little bit since then.

Q. Now, Mr. Anderson, do you recognize the signature of any of the other signatories to that bond?

A. Yes, I do.

Q. And whose are they, please?

A. Mr. Oja and Mr. Montin.

The Court: How do you spell the name of Oja?

A. O-j-a. [16]

The Court: O- what?

A. O-j-a.

Mr. LeGros: I will offer Plaintiff's Exhibit 1 into evidence.

Mr. Simon: I should like to inquire briefly as to its present condition as compared with the time of his signature on the voir dire as a basis for whether it's admissible or not.

Mr. LeGros: If the Court please,——

Mr. Simon: It's our position that it has been

(Testimony of Martin Anderson.)

altered since its signing and it is not admissible until that alteration is explained.

Mr. LeGros: If the Court please, that is a matter of affirmative defense. It is a written document and it speaks for itself.

The Court: The request is denied. You may before the Court finally makes a ruling on the offer. I will sustain the ruling until I find out whether there is to be any cross examination or not. Even though it may not be exactly in line with usual procedure to do it, the Court has the thought that in this case it would be appropriate to do that. You may proceed. Is there anything else you wish to ask of this witness?

Mr. LeGros: No, your Honor. [17]

The Court: You may inquire.

Mr. LeGros: I am not through with my examination, your Honor.

The Court: Very well. I wish you to proceed with your examination then if you are not before the Court extends the right of cross examination of this witness who was called as an adverse witness.

Mr. LeGros: Your Honor is withholding the ruling on this offer?

The Court: I am withholding the ruling on this offer.

The Clerk: Plaintiff's Exhibits Nos. 2 and 3.

(A performance bond was marked Plaintiff's Exhibit No. 2 for identification.)

(A payment bond was marked Plaintiff's Exhibit No. 3 for identification.)

(Testimony of Martin Anderson.)

Mr. LeGros: May I ask, Mr. Clerk, which one is 2 and which one is 3?

The Clerk: No. 2 is the performance bond and No. 3 is the payment bond.

Mr. LeGros: Thank you.

Q. (By Mr. LeGros): Mr. Anderson, handing you what has been marked as Plaintiff's Exhibit 2, can you tell me what that document is, please?

A. It's a copy of a performance bond. [18]

Q. And do you recognize your signature on that bond? A. Yes, sir.

Q. And do you recognize the signature of any other party on the first page?

A. I recognize the signature of Mary E. Galbraith.

Q. She is a corporate official in your corporation, or the corporation with which she was associated? A. She was at the time.

Q. Pardon me? A. She was at the time.

Q. She was assistant secretary at that time?

A. That's right.

Q. Now, turning to the reverse side of that document, do you recognize the signature of any party on that side? A. Yes.

Mr. LeGros: I will offer Exhibit 2.

Mr. Simon: I have no objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to that same document, Mr. Anderson, could you

(Testimony of Martin Anderson.)

tell me if the total amount of premium charged is indicated on that document? A. Yes, it is.

Q. And it says the rate of premium on this bond is what? [19] A. \$47,753.72.

Q. And that bond was signed by you and attested by one of your—your assistant secretary?

A. Yes.

Q. And it was delivered by you to Islands Construction Company, was it not?

A. That I do not remember.

Q. Do you know who filed that bond with the Government? A. I don't remember that.

Q. In searching your memory—

A. It was filed by one of the joint venturers, either by Anderson Construction Company or Islands, but I do not remember who.

Q. Either Anderson or Islands filed that bond with the Government? A. I think so.

Q. And do you know what time it was filed with the Government?

A. No, I don't know the exact date.

Q. It would be before the 17th of June, would it not, 1955? A. Probably.

The Court: You mentioned the joint venture and two of the members of it. Who was the other or third member?

A. Montin-Benson Company. [20]

Q. (By Mr. LeGros): Now, directing your attention, Mr. Anderson, to Plaintiff's Exhibit 3, what is that document, please?

A. It's a payment bond.

(Testimony of Martin Anderson.)

Q. Do you recognize your signature on that document? A. Yes.

Q. Do you recognize the signature of any other party on the first page?

A. Yes; Mary E. Galbraith.

Q. Turning to the back side of that bond, do you recognize the signature of any party on that page? A. Recognize what?

Q. The signature of any party on that page.

A. Very faintly.

Q. And who is that, please?

A. Mary E. Galbraith.

Q. She is the same Mary E. Galbraith that was assistant secretary in your corporation at that time?

A. That's right.

Q. And who attested your signature on the other bond? A. Yes.

Mr. LeGros: I'll offer Exhibit 3 into evidence.

Mr. Simon: No——

The Court: Plaintiff's Exhibit 3 is that [21] what you mean?

Mr. LeGros: Plaintiff's Exhibit 3.

Mr. Simon: No objection, Your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to the reverse side of Exhibit 3, what is indicated there as to the total amount of the premium charged?

(Testimony of Martin Anderson.)

A. It says, "Premium included in charge for performance bond."

Q. Now, Mr. Anderson, in organizing this joint venture what was the participating share of each of the members?

The Court: Do you mean of the joint venture?

Mr. LeGros: Yes, Your Honor.

A. We had twenty-five per cent, Montin-Benson Company had twenty-five per cent, and Islands Construction Company had fifty per cent.

Q. (By Mr. LeGros): And who was given the responsibility of managing this joint venture?

A. Islands Construction Company.

Q. By "management" was it indicated that they would take over all the administrative details of this contract?

A. They took over practically all of them [22] in some matters that——

Q. Who paid the bills? A. They did.

Q. Islands? A. Yes, sir.

Q. So it was only natural that bills should be sent to them?

Mr. Simon: I object to that as leading and argumentative.

The Court: The objection is overruled. As I understand, the rule permits cross examining an adverse witness.

Mr. Simon: Yes. If the Court please, the joint venture is not the defendant in this case, what would have been proper in dealings with the joint

(Testimony of Martin Anderson.)

venture. They have chosen to sue Mr. Martin Anderson, a one-fourth proprietor in this thing, individually without joining the joint venture, and what would have been normal procedure if they were billing—if this suit were against the joint venture, is quite a different thing from what would be normal procedure if they were seeking to hold Mr. Martin Anderson individually.

The Court: What is the purpose of the inquiry?

Mr. LeGros: If the Court please, it's simply to set up the business procedure of this joint venture. I think it's perfectly proper.

The Court: The objection is overruled.

Mr. LeGros: Would you read the question, Mr. Reporter.

(The reporter read the last question as follows: "Q. So it was only natural that bills should be sent to them?")

Q. (By Mr. LeGros): You may answer the question, Mr. Anderson.

Q. I do not know if these various vendors with whom we did business were notified who was the administrative joint venturer. After they were apprised of that I don't see why it shouldn't be sent to Islands Construction Company.

Q. Well, now, what's your answer?

Mr. Simon: I submit that he has answered, if the Court please.

The Court: The objection is overruled.

If he can answer it more directly, Counsel may ask him.

A. In this instance?

(Testimony of Martin Anderson.)

Q. (By Mr. LeGros): Yes, in your business dealings with the joint venture. [24]

A. May I——

Mr. Simon: Objected to as irrelevant and immaterial. There are no business dealings with the joint venture that are material in this case.

The Court: That objection is overruled.

You may answer, Mr. Anderson.

A. May I elaborate a little?

Q. (By Mr. LeGros): Go ahead.

The Court: If it is necessary, Mr. Anderson, to explain. You should first give your answer directly, and if it is necessary to explain the answer to make it full, true and correct, you will have that opportunity in each instance.

A. I'll answer the question yes, but it so happened that our office is in the same building that McCollister's office is, and Mr. Beeson, it was convenient for him to come down to our office and discuss things, sometimes lay an invoice on our desk, knowing that it would be taken to the proper party for action.

Q. (By Mr. LeGros): Did he do that in the case of this bond?

A. You mean delivery of the bond?

Q. Deliver invoices to you.

A. I don't remember whether he did or not.

Q. In searching your memory you haven't been able to find [25] that out?

A. I can't at the moment.

(Testimony of Martin Anderson.)

Mr. LeGros: I have no further questions of this witness at this time.

The Court: Having in mind the possibility that defendant may wish to call this witness as its own, you may cross examine if you wish, Mr. Simon.

Cross Examination

Q. (By Mr. Simon): Mr. Anderson, calling your attention to Plaintiff's Exhibit 1, I call your attention to the third page of what you have denominated an application for a bond. At the top of the third page there are numerous blanks, are there not, which are appropriate to be filled in on the printed form by the insertion of written or typewritten material? A. Yes.

Q. In two of those blanks there is a typewritten insertion in that portion of this document, is there not? A. That is right.

Q. One of those insertions consists of figures, \$47,753.72? A. That's right.

Q. The other insertion in typewriting is the word "various", v-a-r-i-o-u-s? [26]

A. Yes.

Q. I will ask you whether at the time you signed Plaintiff's Exhibit 1 those figures and that word were inserted in those blanks?

A. They were not.

Q. Mr. Anderson, calling your attention to Plaintiff's Exhibit No. 2——

Mr. Simon: And will you hand him also, Mr. Bruff, Plaintiff's Exhibit 3.

(Testimony of Martin Anderson.)

(The exhibits were handed to the witness.)

Q. (By Mr. Simon): Counsel for the plaintiff called to your attention certain language with reference to premium appearing on the back, appearing on Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3. I'll ask you whether that language with reference to the premium was not on the back of Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3 respectively, those recitals with reference to premium were on the back of those instruments?

A. Yes.

Q. Did you sign anything on the back of those instruments? A. No.

Q. Your signature is on the front of the instrument where you identified it? [27]

A. Yes.

Mr. Simon: That is all the cross examination I have at this time, Your Honor.

The Court: Any further interrogation of the witness?

Mr. LeGros: Yes, on redirect.

The Court: You may do so.

Redirect Examination

Q. (By Mr. LeGros): Mr. Anderson, on this occasion you have stated categorically that the figures \$47,753.72 were not on Plaintiff's Exhibit 1 when you signed it, and you're positive at this time?

The Court: You should indicate whether it is a question or a statement. The record will not show that——

(Testimony of Martin Anderson.)

Q. (By Mr. LeGros): Are you positive at this time that those figures were not on the application when you signed it?

A. Yes, I am positive.

Q. You recall your deposition being taken on April 23rd, 1957, in Mr. Simon's office?

A. Yes.

Q. And directing your attention particularly [28] to Page 11 of that deposition, at Line 22 this question was asked you by me:

"Q. Handing you Exhibit 1, I believe you have seen a copy of that which was included with the complaint that was served upon you, the application for the bond we have discussed, a performance bond and a payment bond. I direct your attention to the amount of the premium shown on the reverse side. What is that amount, please?"

The Court: The witness ought to be permitted to see what was then referred to as Exhibit 1. Can you show him what you then referred to as Exhibit 1?

Mr. LeGros: Yes. It's an exact duplicate of what he's got in front of him.

The Court: Will you look at that exhibit, then.

Q. (By Mr. LeGros): Look on Page 3 where the amount of \$47,753.72 is shown. I asked you,

"Q. . . . What is that amount, please?"

And you answered, "A. \$47,753.72."

I then asked you, "Q. I will ask you specifically

(Testimony of Martin Anderson.)

if that [29] blank was filled in when you signed that form?"

And you answered on that occasion, "A. I don't remember whether it was or not."

Now, Mr. Anderson, what is your testimony at this time?

A. I testify that it was not filled in.

Q. You were under oath on that prior occasion, were you not? A. Yes.

Q. Were you deliberately misleading me?

A. No, sir.

Q. What has caused the change in your testimony?

A. I have signed many of these bond applications in blank. I have never——

Q. I'm not asking you about that, Mr. Anderson. I'm asking you why the difference in your testimony between April 23rd and this date now.

A. I think it's impossible to have a figure in there when you sign a bid bond application because nobody knows what the amount is going to be until the job is bid and you know the contract amount.

Q. All right. Then I'm asking you now, what is your correct testimony?

A. That it was not filled in. [30]

Q. Then you were in error on April the 23rd?

Mr. Simon: I object to that as not being a proper inference.

The Court: The objection is overruled.

Q. (By Mr. LeGros): You may answer.

(Testimony of Martin Anderson.)

Mr. Simon: Well, if the Court please, I don't know whether the Court knows what his answer was.

The Court: The Court has ruled. This is cross examination.

A. It may have been partly in error.

Mr. LeGros: That's all.

The Court: Is there anything else, Mr. Simon?

Mr. Simon: May I inquire what page that was on?

Mr. LeGros: Pages 11 and 12.

The Court: Beginning at Line 22, I believe.

Mr. Simon: Will you please hand Mr. Anderson Plaintiff's Exhibit 2.

The Court: That will be done.

The Clerk: He has it.

Mr. Simon: All right.

Recross Examination

Q. (By Mr. Simon): At the time of the interrogation concerning which [31] Counsel has asked you, I'll ask you whether he didn't ask you,

"Q. Handing you Exhibit 1, I believe you have seen a copy of that which was included with the complaint that was served on you, the application for the bonds which we've discussed, the performance bond and the payment bond. I direct your attention to the amount of premium shown on the reverse side."

I'll ask you whether that interrogation did not have as its object and whether your attention was

(Testimony of Martin Anderson.)

not directed to the reverse side of Plaintiff's 2, the performance bond, and whether when he said, "What is the amount, please?" you did not answer, "\$47,753.72." And,

"Q. I will ask you specifically if that blank was filled in when you signed the form?"

whether you did not answer,

"A. I don't remember whether it was or not."

Now, isn't that what transpired? A. Yes.

Mr. Simon: That's all.

Mr. LeGros: No further questions. [32]

The Court: The witness is excused from the stand.

(Witness excused.)

The Court: We will have a short recess for about ten minutes. The jury will retire, remembering the Court's previous admonitions.

(Short recess.)

The Court: All are present as before the recess. You may now proceed.

Mr. LeGros: I would like at this time to call Mr. Oja as an adverse witness.

The Court: Come forward and be sworn as an adverse witness.

VERN OJA

called as an adverse witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full, please? A. Vern Oja.

Q. And your address please, sir?

A. 13023 Holmes Point Drive Northeast, Kirkland.

Q. And what is your employment, sir?

A. Secretary-treasurer of Islands Construction Company. [33]

Q. And were you so engaged in May and June of 1957-1955? A. I was.

Q. And have you been so employed continuously since that date? A. Yes.

Q. You are here in response to a subpoena duces tecum? A. Yes, sir.

Q. Did I ask you to bring statements of account with you as submitted to the joint venture composed of Islands Construction Company, Anderson Construction Company, Inc., and Montin-Benson Corporation? A. Yes, sir.

Q. Do you have those with you?

A. Well, I have some and Mr. Simon, our Counsel, has the others, I believe.

Q. I would ask that the statements of account that you received in connection with this bond premium be given to the clerk for marking.

A. That's one. I think I might have another one here. I don't believe that I have all the statements

(Testimony of Vern Oja.)

that they possibly rendered to us because—they make six copies of everything, and—that's in connection with this also. I believe you have all of them there. Those are all the ones I have in my file. [34]

Q. From your records, Mr. Oja, can you tell me when the first statement of account was received by you?

Mr. Simon: If the Court please, I should like to object upon the ground that it's irrelevant and immaterial to any issue between Mr. Anderson and the United States Fidelity & Guaranty Company what statements were sent by McCollister & Company to Islands.

The Court: The objection is overruled. You may answer, Mr. Oja.

A. I believe I received an original statement approximately June 13th, 1955, which showed the amount of the bond premium as calculated by McCollister & Company.

Q. (By Mr. LeGros): And what was the amount of that premium, please?

A. I think it was——

Mr. Simon: I object to that as not the best evidence, and may it be understood that I have a continuing objection on this line of inquiry as previously stated?

The Court: The previous objection is overruled. The present one, in so far as it is an additional objection, is sustained until it is shown that it is the best evidence.

The Clerk: Plaintiff's Exhibit 4. [35]

(Testimony of Vern Oja.)

(Statements of account were marked Plaintiff's Exhibit No. 4 for identification.)

Mr. LeGros: I will offer Plaintiff's Exhibit 4.

Mr. Simon: I object——

The Court: Have you seen them?

Mr. Simon: Yes, I have seen them. I renew the objection to all of them that I have heretofore raised with reference to the inquiry concerning one, that these purport to be statements from McCollister & Company to Islands Construction Company, and as such they are irrelevant and immaterial.

The Court: I have not heard any testimony since these were marked identifying these with any questions Counsel may ask as preliminary questions as to the history behind these papers which are part of this Exhibit 4 for identification.

Mr. LeGros: If the Court please, these exhibits are offered pursuant to pretrial order.

The Court: May I have the file, Mr. Clerk.

The Clerk: Yes, your Honor (handing file to the Court).

Mr. LeGros: Which was signed by Mr. Simon, at which time we discussed these very exhibits and he admitted them into evidence. [36]

The Court: What testimony has this witness given indicating the relevancy of them? Just in the briefest possible way.

Mr. LeGros: That these are statements of account submitted to Islands Construction Company as manager of the joint venture.

(Testimony of Vern Oja.)

The Court: Did he say they were?

Mr. LeGros: Yes, your Honor.

The Court: They had not been marked up to that time and I am not sure that he was talking about these when he was talking about the subject of having at one time received something of this nature.

Mr. LeGros: Yes, your Honor, that's what he was talking about.

The Court: I am not sure that it is so shown in the evidence. You may let him see those exhibits, if you wish, and see if you wish to ask him any questions about it.

Q. (By Mr. LeGros): Do you have the exhibit before you, Mr. Oja?

The Court: Plaintiff's Exhibit 4, the papers comprising it.

Q. (By Mr. LeGros): Do you have it before you? A. Yes, I do.

Q. And are those statements of account received by you [37] from McCollister & Co., Inc.?

A. Yes, they are.

Q. And are those in connection with a joint venture that Islands Construction Company, Anderson Construction Company and Montin-Benson Corporation were engaged in? A. Yes.

Q. And that is the Elmendorf-Ladd Air Force Base operation? A. Yes.

Q. And was Islands Construction Company designated as the manager of that joint venture?

A. Yes, sir.

(Testimony of Vern Oja.)

Q. And as manager of that joint venture did your organization receive those statements of account? A. Yes, sir.

Mr. LeGros: I'll now offer Plaintiff's 4.

Mr. Simon: It's objected to upon the ground that they are irrelevant and immaterial, for the reason and upon the ground that in this case between the United States Fidelity & Guaranty Company as plaintiff and Anderson Construction Company as defendant no statements of account rendered by McCollister & Company to Islands Construction Company are either relevant or material, and I call to the Court's attention in support of that position and against the suggestion of Counsel that I may have waived the provisions of Paragraph [38] V on Page 10 of the pretrial order herein, starting with the second sentence.

The Court: The Court was considering your objection in the light of the testimony concerning relevancy and not in the light of any statement in the pretrial order. If the statement in the pretrial order is to the contrary, Mr. Simon, I would be very much interested to see that. Is there a contrary provision in the pretrial order?

Mr. Simon: The statement of the pretrial order is that, "No statements of account were rendered by the plaintiff to this defendant."

The Court: What line on what page? Did you say Page 10?

Mr. Simon: Yes, Page 10, Line 7.

(Testimony of Vern Oja.)

The Court: The objection is overruled, gentlemen.

Mr. LeGros: I will renew my offer of Exhibit 4.

The Court: Plaintiff's Exhibit 4 is now admitted.

(Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to the first of the statements of account, you have previously [39] indicated that that statement was received by you on or about June 13, 1955?

A. Well, I'll have to correct that statement. The statement is dated June 15th, so it must have been sometime after June 15th.

Q. When was the next one received?

A. Well, the next one I have here was received sometime after the 1st of September. It's merely a statement of the account that McCollister Company rendered to the joint venture.

Q. Do you find, Mr. Oja, that you received a statement of account on July 1st, 1955?

A. It's very likely that I did, but I don't have it in our files.

Q. And on August 1, 1955?

A. I believe that could be so, as they rendered them every month.

Q. Yes. And what was the amount indicated on the first statement of account that you received?

A. Well, reading this one, the balance due is thirty-five thousand eight—

(Testimony of Vern Oja.)

Q. Directing your attention to the first statement of account.

A. Well, this original invoice—this is an invoice, not a statement. \$47,753.72. [40]

Q. Yes, and was that the amount that was billed you in July and in August?

A. This is the amount that was billed to us in June.

Q. Yes, and I'm asking—

The Court: What year?

A. June, 1955.

Q. (By Mr. LeGros): I'm asking, was that same amount billed to you in July and August?

A. It was not billed. It was shown on a statement as an account owed.

Q. As an account owed, and you received such a statement? A. Yes.

Q. In that same amount in July and August?

A. Well, I don't have copies of those particular statements here, so I can't—I would assume they would probably be in the same amount.

Q. And did you receive a statement of account on September 1, 1955? A. Yes, I did.

Q. And what does that indicate?

A. It shows a balance due of \$35,815.29.

Q. And how do they arrive at that balance?

A. They arrived at that balance by showing, "Contract Elmendorf Air Force Base, \$47,753.72. Return premium: 25% of this contract to be reported by Oklahoma Office, [41] \$11,938.43," and

(Testimony of Vern Oja.)

net balance due McCollister & Company of \$35,-
815.29.

The Court: Mr. LeGros, it might be a great convenience to this jury if you let it be shown in your question that you are directing his attention to the exhibit.

Mr. LeGros: I asked him to refer to his exhibit under date of September 1.

The Court: You did it in such a way that I could not tell whether you were asking a new question the answer to which was to be stated orally or whether it was something you were asking him to read from the contents of Exhibit 4.

Mr. LeGros: Yes, your Honor.

Q. (By Mr. LeGros): Directing your attention, Mr. Oja, to Exhibit 4—— A. Yes.

Q. ——and to the statement under date of September 1, 1955, included therewith, I'm asking you, you have just completed reading from that statement? A. Yes.

Mr. LeGros: I have no further questions of this witness.

The Court: You may examine, having in mind your intention as to calling or not calling this witness [42] in the future as a witness for the defendant.

Mr. Simon: If the Court please, in connection with Plaintiff's Exhibit 4 I should like to have marked for identification this letter of September 14th.

The Court: That will be done.

(Testimony of Vern Oja.)

The Clerk: Defendant's Exhibit No. A-1.

(A letter was marked Defendant's Exhibit No. A-1 for identification.)

Cross Examination

Q. (By Mr. Simon): Mr. Oja, calling your attention to what has been marked for identification as Defendant's Exhibit A-1, I'll ask you whether you recognize that? A. I do.

Q. Is that the original of a communication received by you from McCollister & Company in connection with this same line of statements and bills that Counsel has interrogated you about?

A. It is.

The Court: Who is the addressee of that communication? What is the form of the name of the addressee of that communication?

A. Islands Construction Company.

Q. (By Mr. Simon): I'll ask you whether it has reference [43] to the same obligation that was the subject of Counsel's interrogation of you?

A. It does not have reference to the same obligation. It's a lesser amount.

Q. I'm asking you, does the amount referred to arise out of the execution of the bonds?

A. Yes, it does.

Q. The very bonds in question?

A. Yes, sir.

Q. When did you receive that document?

A. September 15, 1955. It's marked right on the face of it.

(Testimony of Vern Oja.)

Q. Is that your receipt stamp?

A. Yes, it is.

Mr. Simon: I'll offer that in evidence.

Mr. LeGros: I have no objections.

The Court: Admitted.

(Defendant's Exhibit No. A-1 for identification was admitted in evidence.)

The Court: Anything else?

Mr. Simon: Yes. I would like to have the witness read it.

The Court: That may now be done.

Q. (By Mr. Simon): Will you please read that?

A. Yes. This is McCollister & Company, Incorporated, [44] General Agents, 300 Central Building, Seattle 4, Washington. September 14, 1955. Islands Construction Company, Inc., 1103 North 36th, Seattle 3, Washington.

"Gentlemen:

"On September 1, 1955, a statement was sent you showing an amount due of \$35,815.29. This, of course, covers the bond, dated June 3, 1955, for Elmendorf Air Force Base. We understood that this was to be paid in three installments of one third each and we would appreciate it if you would let us have one third of this at this time as we are in need of funds to pay our Companies.

"Very truly yours, McCollister & Company, Inc."

Signed by M. G. Worthing, Treasurer.

Mr. Simon: That's all at this time.

(Testimony of Vern Oja.)

Redirect Examination

Q. (By Mr. LeGros): Mr. Oja, you have previously referred in my direct examination to the statement of account under date of September 1, 1955? A. Yes.

Q. And that shows also a balance due of \$35,815.29, does [45] it not? A. Yes, sir.

Q. After showing the 25 per cent through the Oklahoma office, deducting that amount from the total premium price?

A. Well, I don't have that statement in front of me but I assume that's what it says.

(Plaintiff's Exhibit No. 4 was handed to the witness.)

Q. I'm directing your attention to the statement of September 1 contained in Exhibit 4. The balance shown due there is also \$35,815.29, is it not?

A. Yes.

Q. And that balance is arrived at by deducting 25 per cent of this contract to be reported by Oklahoma City office?

A. By Oklahoma office, yes.

Q. Yes. Now referring further to Exhibit 4, does that exhibit include a statement of account submitted to you by the Oklahoma City office of Ancel Earp?

A. Yes, but of a much later date.

Q. And what is that date?

A. October — well, it was probably received about October 15th, as this received stamp here October 6, 1955, was probably rendered to one of

(Testimony of Vern Oja.)

the other joint venturers and it was probably received by our office probably [46] seven days later.

Q. It was sent to you by one of the other joint venturers?

A. Yes, I believe that was the case.

Q. Probably the Oklahoma City joint venturer?

A. It could be.

Q. And what is that amount, please?

A. \$11,938.43.

Q. That is the same amount shown on the September 1st statement to be reported by Oklahoma office?

A. It is.

Mr. LeGros: That's all.

The Court: Anything further?

Recross Examination

Q. (By Mr. Simon): Mr. Oja, until you received that last statement in October which you have just been testifying about from Ancel Earp, had you ever heard of Ancel Earp?

A. I did not.

The Court: Is there anything else? Are you finished, Mr. Simon?

Mr. Simon: Yes, your Honor.

The Court: Have you finished?

Mr. LeGros: I have finished with this witness.

The Court: This witness is excused.

(Witness excused.) [47]

The Court: Call the next plaintiff's witness.

Mr. LeGros: Call at this time as an adverse witness Mr. Loren Baldwin.

The Court: Come forward and be sworn as an adverse witness.

LOREN ELLSWORTH BALDWIN

called as an adverse witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full, please?

A. Loren Ellsworth Baldwin.

The Court: Warren?

A. Loren Ellsworth Baldwin.

Q. (By Mr. LeGros): And where do you reside, sir? A. 6421 Windemere Road.

The Court: Where?

A. Seattle.

Q. (By Mr. LeGros): And other than being my landlord what is your occupation?

A. Contractor.

Q. Now, Mr. Baldwin, what is your official duty with the Islands Construction Company? [48]

A. President.

Q. And how long have you been president of that concern? A. Six years.

Q. When was it that—

The Court: President of which concern did you say?

A. Islands Construction Company.

Q. (By Mr. LeGros): And when was it that a joint venture was formed between Islands Construction Company, Anderson Construction Company and Montin-Benson Corporation?

(Testimony of Loren Ellsworth Baldwin.)

A. In May, 1955.

Q. And was this joint venture formed for one specific operation? A. Yes, it was.

Q. And what was that, please?

A. For the construction of a project known as 826 in Alaska.

Q. That's what we have previously referred to as the Ladd-Elmendorf Air Force project?

A. (Witness nods his head.)

Q. You'll have to answer because the reporter is taking this down. A. Yes.

Q. Now, Mr. Baldwin, could you briefly tell us what was [49] the scope of that project?

A. Well, it was the construction of three hangars, one field house, some ammunition igloos, an electronic building, and that's about it.

Q. Can you tell us approximately in dollars what that job amounted to?

A. About six million dollars.

Q. And did that job at the time it was being contemplated exceed the capacity of any one of the companies in the joint venture?

A. No, it did not.

Q. Why was a joint venture organized then on this project?

A. Well, I think mainly to minimize the risk of operating a contract of that type in Alaska.

Q. And what were the rights and obligations of the various members of the joint venture as it was constituted?

(Testimony of Loren Ellsworth Baldwin.)

Mr. Simon: That's objected to as irrelevant and immaterial, not the best evidence.

Mr. LeGros: I think he as president and managing agent——

The Court: Read with respect to what. That part of the question I want to hear.

(The reporter read the last question.)

Mr. LeGros: One to the other.

The Court: The objection is overruled. [50]

A. Well, we — Islands Construction Company were the managing directors of the contract. We have——

The Court: What do you mean by that? Do you mean the joint venture in respect to the contract or do you mean something else?

A. No, I mean the joint venture. We managed the joint venture.

The Court: You may proceed.

A. But it is done under an agreement which we sign prior to the procedure of our work. I believe this agreement calls for our company to be the——

The Court: Now wait just a minute. If there is objection to that, the Court——

Mr. Simon: I have already made my objection, if the Court please, and the Court overruled it.

The Court: The objection to this part of it is sustained. He cannot state what the agreement said.

Q. (By Mr. LeGros): Do you have a copy of that agreement?

A. I don't have a copy with me, no, sir.

Q. A copy can be produced?

(Testimony of Loren Ellsworth Baldwin.)

A. I'm sure it can.

Mr. LeGros: I will make demand upon Counsel now for a copy of the agreement between the joint venturers.

Mr. Simon: I object to it as irrelevant and [51] immaterial, confidential, of no importance to this case.

The Court: The objection is overruled.

Mr. Simon: Is the Court directing me to produce a copy of this agreement?

The Court: The Court recognizes the validity of the demand, and Counsel might have certain rights to use as secondary of the agreement if Counsel for the construction company in question did not produce it, Counsel might have certain privileges, and the Court does rule that the demand is a valid demand. You may do that tomorrow, not now. You may have until tomorrow to do that.

Q. (By Mr. LeGros): Mr. Baldwin, as manager of the joint venture was it one of your duties to make payments on statements of account rendered to the joint venture?

A. That is correct, but I believe the—that is correct.

Q. And in that capacity did you sign checks payable to McCollister & Company on the statements of account as submitted by them?

A. I signed checks to McCollister & Company.

Q. You are here under a subpoena duces tecum and I asked you to bring with you cancelled checks

(Testimony of Loren Ellsworth Baldwin.)
made payable to McCollister & Company. Do you have them?

A. I believe our Counsel has them. [52]

Mr. LeGros: I ask that they be marked.

The Court: That may be done.

The Clerk: They will be marked Plaintiff's Exhibit 5.

(Two cancelled checks were marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. LeGros): Directing your attention to Plaintiff's Exhibit 5, which is composed of two cancelled checks, could you give me the date of the earliest of the two checks?

A. The first one is September the 12th. The amount is \$11,938.43 and——

The Court: Wait just a minute. Do not state what the contents are yet.

Q. (By Mr. LeGros): That date again is what?

A. September 12th.

Q. September 12th? A. Yes.

Mr. LeGros: I will offer Plaintiff's Exhibit 5.

The Court: Admitted.

(Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Now referring to the——

The Court: Now you may have him read the [53] amounts, if you wish to do so.

Mr. LeGros: Yes.

Q. (By Mr. LeGros): Referring to the check bearing the date of September 12th, is that the date

(Testimony of Loren Ellsworth Baldwin.)

upon which you signed it or the date upon which the check was drawn, if you recall?

A. I don't recall that, sir.

Q. The check shows it was drawn on September 12th, however, does it not? A. That's right.

Q. And what is the amount of that, please?

A. \$11,938.43.

The Court: 28 or 38 dollars, the end of the dollars digits?

A. \$11,938.43.

The Court: Nine-three-eight forty——

A. ——three cents.

The Court: You may inquire.

Q. (By Mr. LeGros): Now directing your attention to the second of the two checks, what date does that bear? A. October 17, 1955.

Q. And could you tell me whether the check was signed by you on that date or whether it was drawn on that date, if you can recall?

A. No, I can't recall. [54]

Q. And what is the amount of that check, please?

A. \$11,938.43.

Q. Mr. Baldwin, your checks, when they are drawn, are they in two parts? That is, is there a perforation to which is attached a second portion which is removed by the person to whom the check is made payable before deposit? A. Yes, sir.

The Clerk: Plaintiff's Exhibit No. 6.

(Two vouchers were marked Plaintiff's Exhibit No. 6 for identification.)

(Testimony of Loren Ellsworth Baldwin.)

Q. (By Mr. LeGros): Mr. Baldwin, I'll ask you to examine Plaintiff's Exhibit No. 6 which has just been presented to you and ask if you recognize that as the second half portion of each of the checks, a photostat of the second half portion of each of the checks we have referred to?

A. No, I do not recognize it.

Q. Is it similar to the information contained on your second half portions of your checks as to the printed material on there? A. Yes, it is.

Q. And what——

A. Well, the amount of money indicates that it's the same, and I imagine it is, but I don't recognize it. [55]

Q. It has all the appearances of being the same?

A. Yes.

Mr. LeGros: I'll offer Plaintiff's 6.

The Court: Admitted.

(Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

Mr. LeGros: I have no further questions of this witness.

Cross Examination

Q. (By Mr. Simon): Mr. Baldwin, on Plaintiff's Exhibit 6 which Counsel just asked you about I notice that there are two of these vouchers, if you can call them that, in Exhibit 6. It consists of two vouchers. Will you look at them, please. In the upper left-hand corner of one of them there are some figures, or in the upper left-hand corner of both

(Testimony of Loren Ellsworth Baldwin.)

of them there are some figures. Do you know by whom those figures were placed there?

A. No, sir.

Q. What are those figures?

A. One of them reads, "9-19-1955", which I — and the other reads, "10-21-1955".

Q. Do you know anything about who put those figures there or what they represent other than the inference that [56] they probably represent a date?

A. I have no idea, sir.

Mr. Simon: I have no further questions of this witness at this time.

The Court: Is that all?

Mr. LeGros: Yes, Your Honor.

The Court: This witness is excused.

(Witness excused.)

The Court: I believe that we will excuse the jury at this time, too. Will Counsel approach the bench for a moment.

(The Court and Counsel conferred privately.)

The Court: Members of the jury, Counsel and the trial judge will have a good deal of work sometime tomorrow together in the absence of the jury in matters that do not concern the jury. There is a strong likelihood now that this case will go to the jury late tomorrow afternoon. If it does, as to how much longer the jury will need after that to deliberate is a matter that then more or less will be in the jury's own hands, and you cannot tell now and you should not try to tell now, either, how long that

will take, because the case has not been submitted to you yet. There are a good many important things to be done [57] yet before the case will be submitted, to hear the evidence offered by the defendant among other important things.

You should tell everybody in your home who might be concerned about your long absence from home or long delay in arriving home at the end of tomorrow's day or work day or arriving home for dinner or anything of that sort to please excuse you from any thought that they might have that you would be home for dinner, because I do not think it likely that you will be.

I think, though, that I should ask you to be prepared to stay together overnight. That sometimes becomes necessary, and nobody in the world can tell that except the jurors themselves after they begin working and deliberating together, and when it becomes necessary in a case as important as this to do that the Court makes arrangements for the proper and suitable lodging of the jurors in a hotel, and so I think you should tell your family members not to look for you until they saw you coming and not be surprised if you did not get home at all that night, tomorrow night.

I do not wish to disturb your home lives, and neither do Counsel or any party or parties connected with this case, but at the same time if the case should be submitted the Court would not be hasty about ending [58] the jury's deliberations in the case. The Court would give the jury plenty of

time if they felt they needed more time to deliberate in the case.

And so you better be prepared with sufficient necessary attire to remain away from home overnight, and that relates to both men and women jurors, and the men will be interested, of course, in shaving kits and things of that sort.

And the men, I ask all of you who drive your cars here tomorrow, that you put them in a place where you will not have to ask anybody's leave, anybody's permission to get a key to move that car. Leave the car in such place that you can always go to it and always have available the key to it at any hour of the day or night. Otherwise you might be greatly inconvenienced.

The jury, subject to the Court's previous admonition, is excused until tomorrow morning at 9:30. You may now retire subject to the Court's previous admonitions, which the Court requests that you strictly apply to all of your conduct until the further order of this Court.

The jury will now retire until tomorrow morning at 9:30. Be here at that time. [59]

(The following proceedings were had without the presence of the jury:)

Mr. Simon: May I address the Court, please?

The Court: Yes.

Mr. Simon: Mr. Palmer informs me that we have with us some of our forms of requested instructions which we are perfectly willing to deliver now.

The Court: I hope you will serve them on opposing Counsel and give the clerk two copies, if you please, Mr. Palmer, the original ribbon and a legible carbon, the original bearing acceptance of service by opposing counsel. Do not permanently staple them together; use an ordinary paper clip that can be removed.

We may have a few minutes in the morning of something else, but we just cannot help that. We have something scheduled tomorrow morning that we want to attend to.

Counsel are excused until 9:30 tomorrow morning and the court is recessed until 9:15 tomorrow morning.

(Thereupon, at 4:45 o'clock p.m., a recess herein was taken until 9:30 o'clock a.m., Wednesday, May 15, 1957.) [60]

Wednesday, May 15, 1957. 10:45 O'Clock A.M.

(All parties present as before.)

The Court: Do Counsel wish to make any statement which is of concern to them or which they would like the Court to deal with in the absence of the jury?

Mr. LeGros: No, your Honor.

Mr. Simon: Not at this time, your Honor.

The Court: Then we will take the midmorning recess at this time for about ten minutes, and I ask the bailiff to notify the jurors that they will now consider this the midmorning recess and be ready to return to the jury box within a few minutes.

The Bailiff: Yes, your Honor.

(Short recess.)

(The following proceedings were had within the presence of the jury):

The Court: Let the record show that all of the jurors are present and also that all parties on trial with their Counsel are present and are represented by Counsel.

Mr. Simon, did you have something you wish to say?

Mr. Simon: Yes. May it please the Court, [61] in the course of the cross examination as an adverse witness, or the examination as an adverse witness of Mr. Loren Baldwin yesterday by Mr. LeGros, Mr. LeGros made demand upon me that I produce a copy of the joint venture agreement that he referred to in his testimony. I have delivered that to Mr. LeGros, and I should like the record to so show.

The Court: Is there any objection to the record showing that, Mr. LeGros?

Mr. LeGros: No, your Honor. I have it before me.

If the Court please, I should like at this time to recall Mr. Baldwin as an adverse witness for the purpose of some additional questions, both in regard to this agreement and in regard to one or two other matters.

The Court: I promised, and I believe you had no objection, that Mr. Simon might make a request about some other witness' convenience. Do you wish to make any such now at this point?

Mr. Simon: That witness is expected at 11:30,

your Honor. I should like, with the Court's permission and with Mr. LeGros' acquiescence, to interrupt when he arrives.

Mr. LeGros: Certainly. [62]

The Court: That will be granted.

Mr. Simon: I have no objection to the request of Counsel at the present time.

The Court: Mr. Baldwin, would you kindly resume the stand for further interrogation of you as an adverse witness so far as concerns the plaintiff.

LOREN ELLSWORTH BALDWIN

recalled as an adverse witness by plaintiff, being previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. LeGros): Mr. Baldwin, in your capacity as president of Islands Construction Company did you sign on behalf of your company certain payment bond and performance bond in this connection? A. I'm sure I did.

Q. Handing you what has been marked as Exhibit—

Mr. LeGros: There are two of them there.

The Clerk: Do you want them marked together?

Mr. LeGros: They can be marked together, yes.

The Clerk: It will be Plaintiff's Exhibit No. 7.

(A performance bond and payment bond were marked Plaintiff's Exhibit No. 7 for identification.)

Mr. LeGros: If the Court please, I would like

(Testimony of Loren Ellsworth Baldwin.)

[63] to also pass up typed duplicates of those bonds which I think will be much more legible and ask the witness to compare them, and it may be that we can substitute these for the photo copies.

The Court: A circumstance which for the sake of those hereafter considering the exhibit might be desirable.

Mr. LeGros: Does the witness have——

Mr. Simon: No, I have it.

(Plaintiff's Exhibit No. 7 for identification was handed to the witness.)

Q. (By Mr. LeGros): Mr. Baldwin, I ask you to compare the photo copy—first of all I'll ask you, do you recognize your signature on those documents? A. Yes, sir.

Q. And do you recognize the signature of Mr. Vern Oja, your secretary who attested to your signature? A. Yes.

Q. And are those the documents you signed? Are those photo copies of documents you signed?

A. Photo copies of the documents.

Q. I'll ask you now to compare the typewritten copies which have been passed to you.

Mr. Simon: If I may interrupt, if the Court please, my only objection to this exhibit is on the [64] basis of its lack of materiality. This is a bond executed by Islands Construction Company which we maintain has nothing to do with—I mean is not involved in this suit, which is a suit on the premium on the Anderson bond.

Except for that objection,—I mean I submit that

(Testimony of Loren Ellsworth Baldwin.)

objection to the Court, and I will say that after the Court has ruled on that objection one way or the other I shall have perhaps a suggestion to make which would simplify the procedure further.

The Court: Very well. On what issue do you offer this as claimed material evidence, if you do so offer it?

Mr. LeGros: I'm offering it as a course of conduct as to the joint venture to show what took place in this instance which I think will show the same thing took place in the instance of Mr. Anderson and in the instance of Mr. Montin in the execution of the bonds and the information which is contained on the bonds. Since this is a joint venture and they are treated at law as a partnership, I think it is very material as to the acts of one as bearing upon the acts of the other.

Mr. Simon: My position about that is, very briefly, your Honor, that the acts of one partner undoubtedly bind the partnership, but when one [65] partner is sued individually the acts of the partnership are not binding upon him as an individual, and that in short is the basis of my objection.

The Court: Do you contend that this exhibit as evidence if admitted has any bearing upon the joint venture, the entire relationship of the various venturers?

Mr. LeGros: Yes, your Honor.

The Court: And that their action was in unison

(Testimony of Loren Ellsworth Baldwin.)
with respect to how they went about business of like nature?

Mr. LeGros: Yes, your Honor.

The Court: And do you also seek to show that those acts which you claim are similar concerned this one undertaking, this one construction contract?

Mr. LeGros: The entire joint venture was concerned with this one construction contract.

The Court: The objection is overruled. Now Mr. Simon.

Mr. Simon: Upon Mr. LeGros' representation, upon his assurance that he has compared this copy which he now proposes and that it is in all respects like the photostat which has been identified by the witness, I will offer no objection to the reception in evidence of that copy. [66]

Mr. LeGros: I can make that assurance, Mr. Simon.

The Court: Very well. Do you wish the copy to be used instead of the——

Mr. LeGros: I ask that the typed copy be marked as Exhibit 7.

The Court: Very well, and the other photostat which is obviously a bad photostat job, probably through no fault of the photographer but merely because of the character of the instrument and the nature of the printing on the paper, it is not really usable, I ask the clerk to put the clerk's marks on the typewritten one and take the clerk's marks

(Testimony of Loren Ellsworth Baldwin.)

off of the other photostat copy. Return the photostat copy to Counsel who produced it.

Q. (By Mr. LeGros): Now, Mr. Baldwin, referring to the documents which you have before you as Exhibit 7, and referring to the reverse side of the document entitled Performance Bond, I'll ask if there is an amount of premium filled in on that copy?

The Court: You did offer this, did you not?

Mr. LeGros: Yes.

The Court: And the objection was made to it and deemed by the Court to have been made to it after the offer of it in evidence was received. [67] The Court's ruling previously announced on the objection is deemed to have been made after such things were done, and this Plaintiff's Exhibit 7 is and was admitted in evidence.

(Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Do you find a premium figure inserted there, Mr. Baldwin?

A. Yes, I do.

Q. And what is the amount of that premium?

A. \$47,753.72.

Q. And was that amount on the document at the time you signed it?

A. Yes, it was.

Q. And Mr. Baldwin, as manager of the joint venture did you assemble the various executed bonds from the other members of the joint venture?

A. I'm sure I did.

Q. And did you through your organization

(Testimony of Loren Ellsworth Baldwin.)

transmit them to the Corps of Engineers of the United States Government at Anchorage, Alaska?

A. I'm sure we did, sir.

Q. And that was the office with which those bonds were required to be lodged, was it not?

A. Would you repeat that?

Q. That was the office at which the bonds were required to be lodged? [68]

A. That's right.

Q. And did you send the bonds up with a letter of transmittal?

A. Yes, we did.

Q. I have asked you to produce that letter of transmittal.

A. Our Counsel has it.

Mr. LeGros: I'll ask that the copy of the letter which I understand is a copy of the office copy, original office copy—

Mr. Simon: No, this is the office copy, as I understand it.

The Clerk: This will be Plaintiff's No. 8.

(Copy of letter was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. LeGros): Mr. Baldwin, I'll ask you to examine Plaintiff's Exhibit 8, and is that your office copy of the letter of transmittal with which the bonds were enclosed and which was sent to the Corps of Engineers at Anchorage?

A. Yes, I'm sure it is.

Q. And that letter is from the records of your office?

A. Yes, sir.

Q. And it pertains to the business of this joint venture?

A. Yes, sir. [69]

Q. And by whom is it signed, please?

(Testimony of Loren Ellsworth Baldwin.)

A. A. R. Thompson.

Q. Is he a member of your organization?

A. Yes.

Q. And what is his capacity, please?

A. Well, he's the business manager of our company at Anchorage, Alaska.

Q. And what is the date on that letter of transmittal?

A. June 13, 1955.

Mr. LeGros: I will offer Plaintiff's 8.

Mr. Simon: Save only the objection heretofore made as to materiality of the transactions of the joint venture in this lawsuit I have no other objection to add, your Honor.

The Court: Do you offer it for a purpose? If so, state what issues it is material to in this case.

Q. (By Mr. LeGros): Was the bond executed by the Anderson Construction Company included in the bonds referred to in that letter?

A. I'm sure they were, sir.

Q. On that basis——

The Court: On what issue do you offer it?

Mr. LeGros: If the Court please, it definitely fixes the time at which the executed bonds, including the bonds of the Anderson Construction [70] Company, were assembled in Seattle and sent to Alaska, and it definitely shows that the bond premium at that time was ascertained with particularity.

The Court: The objection is overruled. Plaintiff's Exhibit 8 is now admitted.

(Testimony of Loren Ellsworth Baldwin.)

(Plaintiff's Exhibit No. 8 for identification was admitted in evidence.)

The Court: What do you call it? What one-word name may be attributable to it to reflect the character of the information contained in it?

Mr. LeGros: A letter of bond transmittal.

Q. (By Mr. LeGros): Now, Mr. Baldwin, yesterday you testified as to payments made in September and October of 1955 on the bonds in question, did you not? A. No, sir.

Q. I asked you about the checks that you had signed?

A. Yes, I signed the checks, but I mean there was no testimony——

Q. And you testified that the checks were sent to the McCollister Company?

A. I signed them, but I don't know——

Q. Now, in each instance before signing the checks did you discuss this matter with Mr. Martin Anderson? A. Yes, I did.

Q. So he was aware that you were sending out [71] the check in each case before it went out?

A. I'm sure he was.

Q. Now, Mr. Baldwin, this joint venture, as you have stated, was formed for the particular job of the Elmendorf-Ladd Air Force Base, is that not correct? A. Yes.

Q. And did the joint venture execute a joint venture agreement? A. Yes.

Q. And under what date was that agreement signed?

(Testimony of Loren Ellsworth Baldwin.)

A. I can't say, sir, if it was signed in May or June. I imagine it was signed in June.

Q. Would the 14th day of June, 1955, refresh your memory?

A. No, it doesn't, but the document would show.

(Mr. LeGros conferred privately with Mr. Simon.)

The Court: I ask Counsel to let the Court assist them. Do not interrupt interrogation for a conference without the Court's approval.

Mr. LeGros: Would you hand that to the witness.

(The bailiff handed a document to the witness.)

Q. (By Mr. LeGros): Do you wish to refresh your memory from any documents in your possession? On the first page of the document. [72]

A. Well, I'm sure this is the document, yes.

Q. Do you recognize your signatures?

A. Yes, sir.

The Court: Do you wish the record to show that you have shown him an exhibit in this case?

Mr. LeGros: No, your Honor. That is the only copy that I understand the joint venture——

The Court: It is not an exhibit that you have shown him; you have shown him something else, is that what you indicate?

Mr. LeGros: I've given him a record of his own to refresh his memory from, your Honor.

The Court: It is not referred to in the record by any number, so we do not know and never could

(Testimony of Loren Ellsworth Baldwin.)

know in the future whether what he refers to is now or ever will be in the future in the record.

You may proceed.

Mr. LeGros: I'll ask the clerk to mark that.

The Clerk: It will be marked Plaintiff's 9.

(Joint Venture Agreement was marked Plaintiff's Exhibit No. 9 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked Plaintiff's Exhibit 9, can you tell me what that instrument is?

A. This is the joint venture agreement between [73] the three companies participating in the contract known as 826.

Q. Now, by referring to that instrument can you refresh your recollection as to the date of its execution?

A. Well, the agreement was drafted on the 14th day of June.

Q. 1955?

A. 1955. The signatures, I don't know when they were put on, the date of those.

Q. Now, as to this joint venture that you were engaged in with the Anderson Construction Company and Montin-Benson Company along with your own company of Islands Construction Company, would it be proper to state that all obligations under the contract and all liabilities assumed under the contract,—I'm referring now to the Ladd-Elmendorf Air Force Base project,—are assumed on a joint and several basis?

A. Not exactly, sir. There's the physical and the

(Testimony of Loren Ellsworth Baldwin.)

business part of the contract. By the physical part of the contract I mean the outside management, was more or less empowered in the Islands Construction Company, and the business management, such as the purchase of insurance and bonds and business agreements, was vested in Martin Anderson and L. E. Baldwin.

Q. You two had complete authority for the management of the joint venture?

A. That's so. [74]

Q. And does the joint venture spell out the respective interests of the various parties, does the agreement?

A. I'm sure it does, sir.

Q. And that is on the 50/25/25 basis that has been heretofore testified to?

A. Yes, sir. Yes, it's on Page 2.

Q. And does the agreement provide that all insurance and bonds which the joint venture may be required to furnish and the costs thereof are to be charged to and paid by the joint venture?

A. Well, I didn't read this document this morning, but—and I can't answer that question without reading the document.

Q. Well,—

A. If you want to give me time to read it, I'll be glad to.

Q. Referring to Paragraph IX. I'm trying to—

A. Yes, that's spelled out very—

Q. It's very clearly spelled out, is it not?

A. Yes, sir.

Q. And does the document also provide that the

(Testimony of Loren Ellsworth Baldwin.)

commissions on bonds and insurance premiums purchased by the joint venturers shall be divided between agents and brokers designated by each of the parties in proportion of the respective percentage of each party in the contract for said project? [75]

A. Yes, sir.

Q. In other words, Mr. Baldwin, that allows for the appointment of an agent outside of Seattle such as Ancel Earp to participate in this insurance and bonding of this corporation?

A. Well, there was no discussion on that. I wouldn't answer that question yes because generally a joint venture may include joint underwriters and I might want to use one insurance company and my joint venturers, the other two, and it wouldn't be with the same company at all, and it was my own personal interpretation of that paragraph that we could use whom we wished as far as bonding or insurance was concerned up to that percentage.

Q. Then any one of you could allot the bonding or insurance up to his percentage to his own designated broker? A. I would say yes.

Q. Now, does the contract also provide in Paragraph II as to all obligations of the contractor under the said contract as may be concurred in by the joint venture, and all liability assumed against any of the joint venturers as contractor, principal or indemnitor, in connection with any application made for, or the issuance of, any surety bond, shall be participated in on the following percentages,

(Testimony of Loren Ellsworth Baldwin.)

[76] and then designating your respective percentages? A. That's true.

Q. So isn't it the construction of this contract, Mr. Baldwin, that you are interested in this lawsuit up to the extent of fifty per cent?

A. I'm not being sued.

Q. No, but if a judgment is rendered against Mr. Anderson he can call upon you for a contribution up to fifty per cent, your share?

Mr. Simon: I object to that as calling for a conclusion of law.

The Court: The objection is overruled.

Q. (By Mr. LeGros): Isn't that the clear purport of that language? A. I would say yes.

Mr. LeGros: I have no further questions of this witness.

The Court: Having in mind the possibility of the defendant calling this witness later as its own witness, you may nevertheless examine further, if you wish, concerning any matter that was asked on direct examination, or an further direct examination.

Mr. Simon: May it please the Court, reserving the right, of course, to call Mr. Baldwin later as a part of our case, I should like to ask only one [77] or two questions regarding these matters that were brought out.

The Court: You may do that. That right is entirely reserved to Counsel.

(Testimony of Loren Ellsworth Baldwin.)

Cross Examination

Q. (By Mr. Simon): Mr. LeGros asked you, Mr. Baldwin, whether at the time these two checks which you identified yesterday which are Plaintiff's Exhibit 5 were sent to McCollister & Company there was any discussion between you and Mr. Anderson with reference to that.

A. That's true.

Q. And I believe you answered that there had been.

A. That's right.

Q. Will you please tell us what that discussion was?

A. Well, do you want any background, or do you just want——

Q. Just what he said to you and what you said to him.

A. Well, the invoice came in and it was approved for payment by our office. The check was drafted and brought in for my signature. Inasmuch as the rate had been in dispute on the bond, I called up Martin Anderson and I asked Mr. Anderson, "Do you want this invoice paid?" He said, "There's no objection to paying the first invoice. I'm sure that we'll have a corrected invoice at a later date," and he said, "We shouldn't hold it up." [78] The second check, when it went out, went out under similar circumstances. It was held up a few days because I believe Mr. Anderson was out of town, but there was discussion with Mr. Anderson before any check went out on insurance or bonds.

(Testimony of Loren Ellsworth Baldwin.)

Mr. Simon: May the witness be shown Defendant's Exhibit A-1, please.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): Defendant's Exhibit A-1 has been admitted into evidence and is a letter of McCollister & Company to your company regarding the payment of a premium on these bonds?

A. Yes.

Q. It bears notations showing that—well, first, does that letter say in substance—

The Court: Is it in evidence?

Mr. Simon: Yes, your Honor.

The Court: Very well, you may proceed.

Q. (By Mr. Simon): —that the bond premium as shown by invoice of September 1st is thirty-five thousand plus dollars and that it was understood that that would be paid in three installments?

A. That's what this letter says, yes, sir.

Q. And I'll ask you whether there are notations on that letter at the bottom, some dates and amounts? [79]

A. Yes, there are.

Q. Were those notations put on that letter in your office.

A. Not in my office. I imagine in Mr. Oja's office, our accountant.

Q. Well, I mean Islands Construction Company's office. A. Yes.

Q. And I'll ask you whether those notations indicate that on the dates there specified the two of

(Testimony of Loren Ellsworth Baldwin.)

those installments called for by that letter were paid, the amounts being given? A. That is so.

Mr. Simon: That's all from this witness at this time.

The Court: Anything further?

Redirect Examination

Q. (By Mr. LeGros): Mr. Baldwin, that letter makes no reference to the one-quarter that was billed through Ancel Earp of Oklahoma City, does it? A. No, sir.

Q. It merely refers to the September 1st, 1955, statement? A. Yes, sir.

Q. And that statement contained a complete itemization of this account, did it not? [80]

A. I would say we would understand it. It's not itemized, however.

Q. You understood it, however? A. Yes.

Mr. LeGros: That's all.

The Court: Anything further?

Recross Examination

Q. (By Mr. Simon): Mr. Baldwin, had you ever heard of Ancel Earp at the time of the signing of these checks?

A. I was very surprised when I even knew there was such a name. No, we had never had any notice.

Mr. Simon: That's all.

Mr. LeGros: That's all.

The Court: You may step down.

(Witness excused.)

The Court: Call the plaintiff's next witness.

Mr. LeGros: Has Mr. Simon's witness arrived, your Honor?

Mr. Simon: If the Court please, if Counsel has no objection I should like to impose upon the stipulation to call a witness.

Mr. LeGros: Yes, just so the record indicates that this is a part of Mr. Simon's case in chief.

Mr. Simon: Yes, we interrupt Counsel's case with this portion of our own case by reason of his courtesy and the Court's indulgence.

The Court: That request to so interrupt is granted, and this witness will now be sworn as a witness on behalf of the defendant called as a part of the defendant's case in chief with like effect as if the plaintiff had already rested its case in chief, which the plaintiff has not yet done.

KARL K. KATZ

called as a witness by defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simon): Your name is Karl K. Katz, K-a-t-z? A. Yes, sir.

Q. You live in Seattle, Mr. Katz?

A. Yes, sir.

Q. How long have you live in the City of Seattle? A. Since about 1921.

Q. And Mr. Katz, during the year 1955 were you employed by the Montin-Benson Corporation?

(Testimony of Karl K. Katz.)

A. Yes, sir.

Q. And in what capacity? [82]

A. More or less as office manager.

Q. Were you stationed in the City of Seattle?

A. Yes, sir.

Q. Mr. Katz, you have recently been quite ill?

A. Correct. That's right, sir.

Mr. Simon: Will the bailiff please hand to Mr. Katz Plaintiff's Exhibit 1.

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): Mr. Katz, handing you what has been admitted into evidence as Plaintiff's Exhibit 1 in this case, a form of application for a bond——

Mr. LeGros: If the Court please, that document has not been admitted.

Mr. Simon: Oh.

Mr. LeGros: I made the motion and Mr. Simon objected to it.

Mr. Simon: I see.

Q. (By Mr. Simon): Handing you what has been identified as Plaintiff's Exhibit 1, Mr. Katz, marked for identification as Plaintiff's Exhibit 1, I'll ask you whether on the third page of that instrument a purported signature, Karl K. Katz, is your signature? A. It is.

Q. Mr. Katz, I'll ask you whether at the time [83] you signed, placed your signature on that instrument, the figures on that page toward the top of the page in typewriting, forty-seven thousand

(Testimony of Karl K. Katz.)

and some dollars, were inserted, had been inserted in the space where they now appear?

A. No, sir, it was blank.

Q. I'll ask you also whether at the time you signed this document Mr. Martin Anderson's signature appeared on the document?

A. Yes, sir, it did.

Mr. Simon: That's all.

The Court: Will you read the number of that exhibit for identification?

A. 4093.

The Court: Down below.

The Clerk: 1, your Honor.

The Witness: 1.

The Court: You may proceed.

Mr. LeGros: Are you through, Counsel?

Mr. Simon: Yes.

Cross Examination

Q. (By Mr. LeGros): Mr. Katz, could you tell me what date it was that this document was signed?

A. All I could say is I presume it was on the [84] date shown there, June 3rd, but I couldn't swear to that.

Q. That's your best recollection?

A. About then, yes.

Q. With your knowledge of the joint venture, the activities upon which they were engaged and the——

The Court: You have to depend upon your hope that the reporter will put a question mark after

(Testimony of Karl K. Katz.)

your statement. Will you put your statement in the form of a question?

Mr. LeGros: I hadn't completed it yet, your Honor.

The Court: It looked very much like you were not going to in that respect. Do so, will you please.

Q. (By Mr. LeGros): From your familiarity with the joint venture and from your familiarity with the activities leading up to the organization of the joint venture and the preparation of the bids and bonds in this case, it is your best recollection then that this document was signed on or about June 3rd, 1955?

A. I would say on or about, yes.

Q. When the document came to you, Mr. Katz, did you examine it in detail?

A. No, sir. It came to me for the purpose of attesting Mr. Montin's signature.

Q. That was your only concern with it? [85]

A. That's right.

Q. You didn't read the document?

A. No, sir.

Q. And you can state at this time, approximately two years later, that that one blank was left unfilled at the time of signature?

A. The general practice while I was——

Q. Not general practice; I'm directing your attention to this specific document.

A. No, I—I would say that it wasn't filled in, because I had seen many previous ones not filled in.

(Testimony of Karl K. Katz.)

Q. You had not seen many previous ones filled in? A. That's right.

Q. Would you say it was the usual practice to fill these applications in blank?

A. That's right.

Q. That's done throughout the industry so far as you know? A. I couldn't answer that.

Q. Mr. Katz, I'll ask you if any of the typewritten portion on the front of Exhibit 1 was filled in at the time you received this document?

A. I couldn't truthfully answer that because it usually came to me in this shape.

Q. You just look at that one page?

A. Yes, sir, just to attest Mr. Montin's signature. [86]

Q. Was any of the typewritten portion which appears at the bottom of the page inserted at that time, or was the whole page blank?

A. The names of the construction companies involved were inserted, yes.

Q. They were typed in? A. Yes.

Q. They had to be from the way Mr. Montin wrote over them, did they not?

A. That's right.

Mr. LeGros: I have no further questions at this time.

Redirect Examination

Q. (By Mr. Simon): Mr. Katz, have you any independent recollection at all as to the date on which this instrument was signed? A. No, sir.

Q. Your statement to Counsel was based en-

(Testimony of Karl K. Katz.)

tirely upon the date that appears on the instrument? A. Yes, sir.

Q. Do you recall independently when it was that this job, when the joint venturers in this job submitted their bid?

A. No, sir, I wouldn't necessarily be familiar with that at all. [87]

Mr. Simon: That's all.

Mr. LeGros: I'd like to call Mr. Katz now as an adverse witness.

The Court: Wait just a minute. Have you finished your cross examination of Mr. Katz in connection with the direct examination by Mr. Simon?

Mr. LeGros: Yes, your Honor.

The Court: Does Mr. Simon excuse the witness as far as the defendant's case in chief is concerned?

Mr. Simon: I do, your Honor.

The Court: Then that interruption is now ended. We now resume the taking of testimony as a part of the plaintiff's case in chief which was temporarily interrupted for the purpose of the defendant's calling Mr. Katz as a defendant's witness. The plaintiff's case in chief is now resumed and you may call, which I understand you are now doing, this witness as an adverse witness for the plaintiff. Is that right?

Mr. LeGros: Yes, your Honor.

The Court: Let the record show that. [88]

KARL K. KATZ

recalled as an adverse witness by plaintiff, being

(Testimony of Karl K. Katz.)

previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. LeGros): Mr. Katz, you are a corporate official of the Montin-Benson Construction Company, are you not?

The Court: The witness has already been sworn.

The Clerk: Do you want these separate or together?

Mr. LeGros: They can be marked together.

The Clerk: It will be Plaintiff's Exhibit No. 10.

(Copies of payment bond and performance bond were marked Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. LeGros): The question was, Mr. Katz, are you not or were you not at the time of this transaction in May and June of 1955 a corporate official of the Montin-Benson Corporation?

A. Assistant secretary.

Q. Assistant secretary? A. Yes.

Q. And it was in that capacity that you acted [89] in dealing with the various documents which you have signed in connection with the joint venture?

A. The only thing I had to do with any of these documents was such as in this case, attesting Mr. Montin's signature.

Q. Mr. Katz, are you familiar with the broker or insurance agent that the Montin-Benson Corporation uses on its operations?

(Testimony of Karl K. Katz.)

A. I don't quite understand your question, "familiar".

Q. Do you know who it is? A. Yes, I do.

Q. And who is that, please?

A. McCollister & Company.

Q. Did they at any time ever use Ancel Earp in Oklahoma? A. Yes.

Q. He is their regular broker, is he not?

A. That is correct.

Q. And has the Montin-Benson Corporation in its operations in this area channeled its business through the Ancel Earp Company?

A. Not to my recollection.

Q. Pardon me?

A. Not to my recollection. It's usually been done locally.

Q. Directing your attention to the Ladd Air Force-Elmendorf Base job, was that business channeled through Ancel Earp? [90]

A. I wouldn't be—what job again please, sir?

Q. The Ladd Air Force Base.

A. Well, there were several. Which one?

Q. This is the Ladd Air Force Base-Elmendorf job which was the subject matter of the joint venture. A. Of this joint venture?

Q. Yes. A. And your question was——?

Q. Was part of that bond business channeled through Ancel Earp?

A. I would have no knowledge of that.

Q. You don't have any knowledge of that?

A. No, sir.

(Testimony of Karl K. Katz.)

Q. Now directing your attention to the documents which have been given to you, Plaintiff's Exhibit 10, do you recognize your signature on the documents? A. Yes, sir.

Q. Do you recognize the signature of Mr. Montin? A. Yes, sir.

Q. And what are those documents, please?

A. Payment bond and performance bond.

Mr. LeGros: I'll offer the Plaintiff's Exhibit 10.

Mr. Simon: If the Court please, I have only the objection heretofore made. [91]

The Court: You offer it for the same purpose as the last exhibit?

Mr. LeGros: Yes, your Honor.

The Court: It is admitted, the objection being overruled.

(Plaintiff's Exhibit No. 10 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Directing your attention to the reverse side of the payment bond, does that show a premium amount? A. No.

Q. What does it state?

The Court: Are you still referring to Plaintiff's Exhibit 10?

Mr. LeGros: Still referring to Plaintiff's Exhibit 10, the payment bond.

A. (Reading) "Premium included in charge"——

Q. (By Mr. LeGros): Pardon me. There's a little competition out here.

A. Pardon me, sir.

(Testimony of Karl K. Katz.)

The Court: Now would you kindly repeat the statement you were interrupted in.

A. You mean what this——

The Court: Just what you were doing, just resume from what you last started to say and did not [92] because of the noise.

A. Printed on the form is “Total amount of premium charged”, a blank, and then inserted in there is “Premium included in charge for performance bond”.

Q. (By Mr. LeGros): All right. Now directing your attention to the performance bond and the reverse side of that instrument, still in Exhibit 10, does that have a premium amount inserted in the blank? A. Yes, it does.

Q. And what is the amount, please?

A. \$47,755.72 (sic).

Q. All right. Does your signature appear directly below that in the certificate as to corporate principal? A. Yes, sir, it does.

Q. And in that certificate you attest to the office of Mr. Montin? A. Yes.

Q. I’ll ask you if that amount of \$47,753.72 was on that document at the time you affixed your signature thereto? A. No, sir, it was not.

Q. It wasn’t? A. No.

Q. Are you sure of that? A. Quite.

Q. Do you know what happened to that [93] document after it left your hands? A. No, sir.

Q. Do you know if it was delivered to Mr. Baldwin?

(Testimony of Karl K. Katz.)

A. I couldn't swear that it was delivered to Mr. Baldwin, but I assume that it was, yes.

Q. You assume it was delivered through your office to Mr. Baldwin?

A. I have no knowledge of it having been delivered to Mr. Baldwin.

Q. But that's your belief from the practice in your office? A. That's right.

Mr. LeGros: That's all I have.

The Court: Mr. Katz, that Exhibit 10 is called what properly? Look at it and answer.

A. Well, the cause number shown, sir——

The Court: No, no, what kind of a paper is that? What kind of information is contained in that exhibit?

A. Well, it looks to me like a photostatic copy of the payment bond.

The Court: Is there any other kind of bond included in it?

A. There are two really. The second one is——

The Court: Name the two kinds of bonds which you say are included in that exhibit. [94]

A. One is a payment bond and one is a performance bond.

The Court: You may inquire.

Mr. Simon: No questions, your Honor.

The Court: Anything further?

Mr. LeGros: Nothing further.

The Court: Do Counsel desire to excuse the witness permanently?

Mr. LeGros: I understand that Mr. Katz is

(Testimony of John C. Beeson.)

under a doctor's care and I have no wish to detain him.

The Court: Do you make that request?

Mr. Simon: Yes, I make the request that he be permanently excused.

The Court: Mr. Katz, you are permanently excused and may go on about your own affairs with like effect as if you had not been asked to come here.

The Witness: Thank you, sir.

(Witness excused.)

The Court: Call the next plaintiff's witness.

Mr. LeGros: We'll call Mr. J. C. Beeson. [95]

JOHN C. BEESON

called as a witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full, please? A. John C. Beeson.

Q. And where do you reside, Mr. Beeson?

A. 900 University Street.

Q. That's the Baldwin Apartments?

A. That's correct.

Q. Mr. Baldwin is your landlord also?

A. Yes.

Q. Are you married, Mr. Beeson?

A. Yes, I am.

Q. And how long have you resided in the City of Seattle? A. Since about 1926.

(Testimony of John C. Beeson.)

Q. During that time what business have you been engaged in? A. Insurance.

Q. As part of your activity in the insurance field is the soliciting and obtaining of surety bonds one of your activities? A. Right.

Q. In May and June of 1955 with what organization were you associated? [96]

A. McCollister & Company.

Q. And in what type of business was McCollister & Company engaged?

A. General insurance and bonds.

Q. Mr. Beeson, when was it that you first heard of the proposed joint venture of Islands Construction Company, Anderson Construction Company and Montin-Benson Corporation?

A. Well, I couldn't state that exactly but it's customary to know about ten days, a week to ten days ahead of the bids.

Q. And that's the first time you knew that there was this association of firms?

A. That would be right.

Q. And through whom were you advised of this association?

A. Well, it could be either Mr. Baldwin or Mr. Anderson.

Q. You've had long dealings with both of those gentlemen? A. That is right.

The Court: I believe he asked you with whom it was, he did not ask you with whom it might have been or could have been.

A. I couldn't tell you.

(Testimony of John C. Beeson.)

Q. (By Mr. LeGros): It was either one of the two? A. That is right.

The Court: Do you ask him that as a question [97] or are you stating to him that as a fact?

Mr. LeGros: I'm asking him as a question.

The Court: Very well. Please let your words and the form of the sentence so indicate.

Q. (By Mr. LeGros): It was either Mr. Baldwin or Mr. Anderson? A. That is correct.

Q. Now, Mr. Beeson, at the time that you were advised of this proposed joint venture could you tell me approximately the date that this advice was communicated to you? A. No, I could not.

Q. Could you give us an approximation?

A. Well, as I say, it would be a week to ten days before the bids would be opened.

Q. And do you know when the bids were opened in this case? A. No, I don't remember.

Q. Would that be in May of 1955?

A. As I recall it was in May, the latter part of May.

Q. The latter part of May of 1955; is that correct, sir? A. (Witness nods his head.)

Q. Now, Mr. Beeson, were you advised as to the particular job that this joint venture was interested in? A. Yes.

Q. And what was that job, sir? [98]

A. It was various buildings at Ladd and Elmendorf Air Force Bases.

Q. And were you advised as to what the approximate amount would be involved in that operation?

(Testimony of John C. Beeson.)

A. I believe I was.

Q. And what was it, sir?

A. Somewhere under seven million.

Q. And did you participate in a conference with Mr. Anderson and Mr. Baldwin pertaining to that job and their proposed bid?

A. I believe I did several times.

Q. And was the question as to the obtaining of bonds for the joint venture raised with you?

A. That is right.

Q. And what type of bonds was it that they were interested in obtaining?

A. Final payment and performance bonds as well as the bid bond.

Q. And were those the types of bonds that your company was able to obtain for persons engaged in that business?

A. That is right.

Q. Now, Mr. Beeson, is the insurance industry in the State of Washington regulated by statute?

A. Yes, it is.

Mr. Simon: That's objected to as irrelevant and immaterial. [99]

The Court: What have you to say?

Mr. LeGros: I asked if the insurance business——

The Court: I know, but what have you to say in response to Counsel's objection?

Mr. LeGros: I think it's a matter of law in this state that the insurance business is regulated, of which the Court can take judicial notice.

The Court: Do you think that is an answer to

(Testimony of John C. Beeson.)

his objection that it is not relevant? I understood you objected on the ground that it was not material.

Mr. Simon: That's right, your Honor.

Mr. LeGros: It's an admitted fact in this case, if the Court please, that certain rates were filed as required by statute with the Insurance Commissioner, and it's pertaining to approach that subject that I'm asking this preliminary question.

The Court: The objection——

Mr. Simon: If the Court please, our objection goes to the requirement of the filing of those rates as being irrelevant and immaterial. The fact that the rates quoted had also been filed, I haven't any objection to an inquiry as to the rates that this company quoted and the time when they were [100] charging the rates in question. My objection goes only to the materiality of anything having to do with the requirement of such filing.

Mr. LeGros: If the Court please, I believe that in order to establish the rate we have to first show that the rates were required to be filed, and we will establish that the insurance code provides that anybody writing bonds in this state must file a rate with the Insurance Commissioner.

The Court: The objection is overruled. You may inquire.

Mr. LeGros: Could you read the question, Mr. Reporter.

(The reporter read the last question as follows: "Q. Now, Mr. Beeson, is the insurance

(Testimony of John C. Beeson.)

industry in the State of Washington regulated by statute?"")

A. Yes, it is.

Q. (By Mr. LeGros): And in order for a surety company to quote a bond premium is it necessary that that company have filed with the Insurance Commissioner of the State of Washington a schedule of rates?

Mr. Simon: May it be understood, if the Court please, without the necessity of continued [101] interruption, that the objection I have heretofore made extends to this line of inquiry?

The Court: Do you approve?

Mr. LeGros: Yes, your Honor.

The Court: The Court does, and it will be so understood. Proceed. The same ruling.

Mr. LeGros: Could you repeat the question, Mr. Reporter.

(The reporter read the last question as follows: "Q. And in order for a surety company to quote a bond premium is it necessary that that company have filed with the Insurance Commissioner of the State of Washington a schedule of rates?"")

A. Yes, they must do so.

Q. (By Mr. LeGros): Now, reference has been made heretofore to the so-called board companies. Could you tell us what is meant by the phrase "board companies"?

A. Well, there are a number of companies throughout the United States that subscribe to a

(Testimony of John C. Beeson.)

rating bureau known as the Towner Rating Bureau, and Towner sets these various rates and then the companies file them in the various states that they do business in. [102]

Q. And has the rating bureau, or had the rating bureau filed in the State of Washington a schedule of rates which was applicable to these bonds at the time they were executed?

A. That is right.

The Clerk: It will be marked Plaintiff's Exhibit No. 11.

(A rate page from Towner Rating Bureau manual was marked Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked as Exhibit No. 11, could you tell me what that is, please?

A. This is a rate page taken from the Towner Rating Company's manual.

Q. And could you tell me if that is the rate that was in effect in the State of Washington for this type of bond in May and June of 1955?

A. It was in effect at that time.

Mr. LeGros: I will offer Plaintiff's Exhibit 11.

Mr. Simon: I understand that my objection extends to this line of inquiry.

The Court: Is this particular exhibit offered for the purpose previously mentioned?

Mr. LeGros: Yes, your Honor. [103]

The Court: And/or any other?

Mr. LeGros: Yes, your Honor, and this exhibit

(Testimony of John C. Beeson.)

has been admitted specifically in the pretrial order.

The Court: Subject to what conditions?

Mr. LeGros: Subject only to relevancy and materiality.

The Court: The objection——

Mr. Simon: I am not making any objection on the basis of lack of proper identification.

The Court: I understand that from what he has just said. If you understand differently, you may so state. The objection reserved in the pretrial order is overruled as applied to this particular document. And Plaintiff's Exhibit 11 is now admitted.

(Plaintiff's Exhibit No. 11 for identification was admitted in evidence.)

Q. (By Mr. LeGros): Mr. Beeson,——

The Court: Pardon me. Mr. Beeson, what do you call that Exhibit 11?

A. It's a rate page.

The Court: Rate what?

A. Page.

The Court: Page from what?

A. Towner Rating Company's manual.

The Court: You may proceed. [104]

Q. (By Mr. LeGros): In fixing the premium for a bond, and I'm speaking now of a performance bond or a payment bond in general and not any specific bond, how is that rate determined?

A. It's determined on the type of the work, the amount of the contract and the length of duration of the contract.

Q. And what is the base upon which the bond

(Testimony of John C. Beeson.)

premium is based? In other words, do you take into account the contract price?

A. It is based entirely on the — not entirely. You use the contract price, the type of work and the duration.

Q. And knowing the type of work, the duration and the contract price, you can then compute a bond premium from your manual?

A. You can. There are certain cases where a bond premium is less than fifty per cent and the premium is therefore reduced. There are quite a few factors you take into account.

Q. And Mr. Beeson, directing your attention now to the conference and conferences between Mr. Anderson and Mr. Baldwin preparatory to the execution of bonds, were they able in those preliminary conferences to give you any definite contract price?

A. They might have been able to but I wouldn't ask them for it. [105]

Q. And why was that, sir?

A. Because I wouldn't want to know.

Q. Would that be because it would be related to the bid that they were submitting in competition to other contractors?

A. Which would be confidential to themselves.

Q. And in this case did they indicate to you the amount of their bid?

A. Not that I recall.

Q. And did they ask you as to the rate of bond

(Testimony of John C. Beeson.)

premium that would be charged them for this bond or for the bonds in this case?

A. They might have.

Q. And would your answer have to be an approximation based upon——

A. I would give them the rate on certain amounts of the contract and then they could figure out their own premium.

Q. And was that what was done in this case?

A. If the rate was quoted it would be done that way.

Q. And how would you quote a rate to them?

A. Well, the first two and a half million it would be \$8.00 per thousand contract price. The next two and a half million would be \$7.67. Over that would be \$7.33. They, knowing what they were going to bid, could figure out what the bond premium would cost them.

Q. And so that was the information you gave [106] them in these preliminary conferences?

A. If that was the information they asked for that was the information they received.

Q. And Mr. Beeson, did you at any time indicate to them that you could obtain a bond for them at less than the established rate then in effect as filed with the Insurance Commissioner of the State of Washington.

A. I told them if they wanted to use another company the rate could be cheaper.

Q. You were referring then to what type of company?

(Testimony of John C. Beeson.)

A. What we call the non-Towner companies.

Q. Broadly have those been referred to previously as non-board companies?

A. Well, it's one and the same.

Q. So I take it then that you told them you could obtain a cheaper rate with a non-board company?

A. I didn't have to tell them. They knew that, but I probably told them anyway.

Q. They were very familiar with bonds and bonding rates, were they not?

A. That is correct.

Q. And did they indicate a preference for United States Fidelity & Guaranty Company bonds?

A. They must have, otherwise they wouldn't have been used.

Q. And did you indicate to them in any way [107] whatsoever that you could obtain a United States Fidelity & Guaranty Company bond at a rate less than the rate established by the Towner Rating Bureau as filed with the Insurance Commissioner?

A. I told them that I knew that in the near future those rates were going to be reduced and if the bond was written prior to that time the new rates could be used. They didn't know what the new rates would be nor when they would be approved.

Q. Now let me get this straight, Mr. Beeson. You told them what, again?

(Testimony of John C. Beeson.)

A. I told them that shortly the rates on these Towner companies would be reduced and if they were reduced, or the time they were approved was prior to the time the bonds were written, that reduction would be given to them.

Q. And if the bonds were executed before the reduction what did you indicate?

A. Considerably, as I remember it.

Q. Pardon me?

A. Considerably, as I remember it.

Q. But what did you indicate as to the possibility of getting a reduction?

A. None to my knowledge.

Q. Pardon me? [108]

A. None to my knowledge.

Q. In summary, then, did you tell them that if—

Mr. Simon: Objected to as leading.

The Court: The objection is sustained.

Mr. LeGros: Yes, your Honor.

Q. (By Mr. LeGros): And when were the bonds executed in this case, Mr. Beeson?

A. A performance bond and a payment bond.

Q. And when were they executed?

A. I believe it was the first part of June, but that will show on the bond.

Q. In 1955? A. Yes.

Q. And Mr. Beeson, subsequent to the execution of the bonds was there filed with the Insurance Commissioner a reduction in bond rates?

A. No.

(Testimony of John C. Beeson.)

Q. By the Towner rating system? A. No.

Q. That was after these bonds were executed?

A. That is right.

Q. I'm directing your attention now to July of 1955. Were the bond rates for the non-board companies reduced during that month?

A. Well, they were reduced shortly after the [109] period or the time that the board companies were reduced, but I couldn't say without looking at the manual, give you the exact date.

The Clerk: It will be Plaintiff's Exhibit No. 12.

(A rate page from Towner Rating Bureau manual was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked as Plaintiff's Exhibit 12, could you tell me what that is, Mr. Beeson?

A. Well, this is another page from the Towner rating manual.

Q. And what is the effective date of that rating?

A. July 20, 1955.

Q. And is that the change in rate schedules that you had reference to? A. That is right.

Mr. LeGros: I will offer Plaintiff's 12.

The Court: Plaintiff's Exhibit 12 is now admitted.

(Plaintiff's Exhibit No. 12 for identification was admitted in evidence.)

The Court: What do you call that, Mr. Beeson?

A. It's a rate page from the Towner rating manual. [110]

(Testimony of John C. Beeson.)

The Court: At this time we will take the noon recess until two o'clock this afternoon. The jury will now retire subject to the Court's previous admonitions.

I cannot tell you finally, I do not believe now that this case will go to the jury today. I cannot tell you finally. What I say is not controlling of what will happen, but that is my present belief. It may be changed by later developments.

The jury may now retire for the noon hour.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 2:00 o'clock p.m.) [111]

Wednesday, May 15, 1957

2:00 O'Clock P.M.

(All parties present as before.)

The Court: Unless Counsel have a different request I would suggest you bring in the jury.

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. You may proceed. The witness has returned to the stand for further interrogation.

Q. (By Mr. LeGros): Mr. Beeson, you have stated that you had heard in May that the board companies were considering a reduction in rates. That is true, is it not?

A. It was either in May or prior to that.

Q. Did you know at that time the extent of the reduction? A. No.

(Testimony of John C. Beeson.)

Q. Did you know that there would in fact be a reduction of any substantial amount?

A. Well, only I felt that if there wasn't a substantial amount there was no point in making one.

Q. When was it that the actual reduction was known to the trade?

A. Sometime in the middle part of July.

Q. In July? [112]

A. Yes. It's on that rate page you gave me a while ago.

Q. Yes. Now, Mr.——

The Court: Do you think that was Plaintiff's 12 or Plaintiff's 11 that you had in mind in making your last remark?

A. It would be on the white page, temporary one.

The Court: Let the witness have both those last two exhibits and let him say what he had in mind.

(The exhibits were handed to the witness.)

The Witness: Exhibit 12.

Q. (By Mr. LeGros): Plaintiff's 12?

A. Yes.

Q. And that's the first time you knew what the rate would be? A. That is correct.

Q. Now, Mr. Beeson, handing to you what has been marked for identification as Plaintiff's Exhibit 1, could you tell us what that is, please?

A. This is a contract bond application.

Q. And do you recognize the signatures affixed to that application? A. Yes, I do.

Q. And who are they, please?

(Testimony of John C. Beeson.)

A. Martin Anderson, Vern J. Oja, William V. Montin and Karl K. Katz. [113]

Q. Are the first three mentioned three representatives of the joint venture with which we are here concerned? A. That is right.

Q. Now, Mr. Beeson, directing your attention to the material on the bond which is contained by typewriting rather than the printed form, could you tell me where and by whom that information was placed on that document?

A. You mean who typed it?

Q. Not typed it; in what office?

A. Well, it would be in McCollister & Company's office.

Q. And could you tell me about the approximate time that that bond application form was drawn up?

A. Either June 3rd or shortly thereafter.

Q. And could you tell me if all the typewritten material was placed upon the bond at the same time? A. No, I couldn't.

Q. Pardon me? A. No, I couldn't.

Q. Would it be around the approximate time that you have mentioned?

A. Well, if it wasn't on the application when it left McCollister's office it would have been placed on there when it was returned, which I would imagine wouldn't take over a week or ten days.

Q. Now directing your attention to the third page of the application form, do you find figures inserted in a space left for the insertion of figures?

(Testimony of John C. Beeson.)

A. I do.

Q. Could you tell me, Mr. Beeson, whether to your knowledge those figures were on the bond application when it left your office and went to the members of the joint venture?

A. It would not necessarily have to have been. It might have been, it might not have been.

Q. In preparing bond applications for bonds of this magnitude what is the usual practice in your office?

A. The usual practice would have been to have had the bond premium inserted.

Q. A great number of bonds, however, are written, are they not, Mr. Beeson, on bond applications which are signed and where nothing is inserted?

A. That is correct, especially where they use an application both for the bid bond and the final bonds.

Q. Yes. And Mr. Beeson, directing your attention further to the printed material on Page 3 of the bond and specifically the ninth provision which forms a part of this agreement——

A. That's customary. You'll find that in all bond applications.

Q. And by the terms of that provision is the [115] bonding company given the right and privilege to fill in any blanks left?

A. Or correct any errors.

Q. And any such notation that they made is prima facie correct, is it not, by the terms of the provision?

(Testimony of John C. Beeson.)

A. Well, so far as I know it would be.

Q. That's what the agreement provides for, is it not? A. Yes.

Q. Pardon me? A. Yes, it does.

Q. Now, directing your attention to the face of the bond, there is certain material there which is in pen and ink. Could you tell me in whose handwriting that information is?

A. Mr. Don Roger's.

Q. And who is he, please?

A. He is the surety manager of McCollister & Company at the present time.

Q. And directing your attention to Page 2 of the bond application, in whose handwriting is that information? A. That is my handwriting.

Q. Now,—

Mr. LeGros: I will renew my offer as to Exhibit 1.

Mr. Simon: I renew the objection, if the Court please. [116]

The Court: I wish to hear from Counsel on that in the absence of the jury at the earliest opportunity. You may proceed.

Q. (By Mr. LeGros): Now, Mr. Beeson, the application on its face contains the contract price figure of \$6,170,357.00. Is that the base upon which the bond premium was computed at the rates then in effect? A. Yes, sir.

Q. And on that computation what is the bond premium for these bonds? A. \$47,753.72.

(Testimony of John C. Beeson.)

Q. And is that the only rate that could be charged for bonds of that size at that time?

Mr. Simon: Objected to.

A. Well,—

The Court: Just a minute.

Q. (By Mr. LeGros): Under the rating schedule as filed?

Mr. Simon: If he means by that was that the rating schedule rate according to the rating schedule that he has testified about, I think it's repetitious. If he means by that that any contract for a different rate is illegal, I submit that it's improper.

The Court: Do you care to clarify your question?

Mr. LeGros: Your Honor, I asked— [117]

The Court: In view of the objection, because I think the last part of the objection is well taken.

Mr. LeGros: The question was whether or not that was the bond premium which is the result of a mathematical computation on the basis of the rate schedule then in effect.

Mr. Simon: I have no objection to that.

The Court: That is not what he said. Read what he said, Mr. Reporter. That is not what I heard him say. Maybe the reporter has it differently.

(The reporter read the question back as follows: "Q. And is that the only rate that could be charged for bonds of that size at that time?")

Mr. LeGros: Then I added something to it. Will you read the addition.

(Testimony of John C. Beeson.)

(The reporter read back further as follows:

“Q. Under the rating schedule as filed?”)

Mr. Simon: I object upon the grounds stated.

The Court: The objection is sustained. You may have the opportunity of restating or clarifying your question or stating more clearly the question.

Q. (By Mr. LeGros): Under the rating [118] schedule as filed, Mr. Beeson, with the Insurance Commissioner of the State of Washington, and on a contract of \$6,170,357, and with the parties seeking the bond being the members of the present joint venture, and a bond written in a so-called board company, and on the basis of the rating schedule then on file, what would the bond premium be?

Mr. Simon: Objected to as repetitious.

The Court: The objection is overruled.

A. The bond premium would be \$47,753.72.

Q. (By Mr. LeGros): Mr. Beeson, handing to you what have been marked as Plaintiff's Exhibits 2, 3, 7 and 10, would you tell me if you know what those documents are?

A. Well, Exhibit 2, Exhibit 3, Exhibit 7 and Exhibit 10 are all copies of performance and payment bonds.

Q. And where were those bonds prepared, Mr. Beeson?

A. They were prepared in the office of McCollister & Company.

Q. And when those bonds were prepared by McCollister & Company was the amount of pre-

(Testimony of John C. Beeson.)

mium as shown on the reverse side of three of the bonds inserted at that time?

A. Well, when a performance bond or payment bond is written and leaves their office, the premium is always in place.

The Court: No, that does not answer the question.

Q. (By Mr. LeGros): Was it on this occasion?

The Court: If you know. [119]

A. Well, I know it was because they don't let performance bonds out of the office without a premium on them.

Q. (By Mr. LeGros): And why is that, Mr. Beeson?

A. Because it's a Government rule.

Q. In other words, you're complying with a mandate of the United States Government?

A. That is right.

Mr. Simon: Objected to as not the best evidence.

The Court: That objection is overruled.

Q. (By Mr. LeGros): And why is that, Mr. Beeson?

A. Well, the Government checks these bond premiums.

Q. Do they check them to correspond with the rating schedule? A. That is right.

Q. And that is why the bond—the Government—

The Court: Just a minute. This is direct examination of your own witness. Do not lead him. Proceed.

(Testimony of John C. Beeson.)

Q. (By Mr. LeGros): After the bonds were prepared in your office what happened to them?

A. They would be delivered to the contractor.

Q. And what would the contractor do with them?

A. He would complete the bond and forward it to the contracting officer.

Q. Did you see these bonds again after they left your office? [120]

A. Not to my knowledge.

Q. Now, Mr. Beeson, after the bonds were executed——

Mr. LeGros: I'll withdraw that question. You may examine, Counsel.

Cross Examination

Q. (By Mr. Simon): Mr. Beeson, have you any independent recollection as to who typed these performance and payment bonds of which Exhibits 2, 3, 7 and 10 are copies?

A. Not any independent recollection, but if you could check the records of McCollister & Company and see who my bond girl was at that time you could find out.

Q. Your answer is that you do not have any independent recollection? A. No, I don't.

Q. Do you have any independent recollection of who took the bonds to be signed, if anybody did?

A. As a rule it would have been myself. If I had not been around it probably would have been Mr. Rogers.

(Testimony of John C. Beeson.)

Mr. Simon: Will you please read the question to the witness?

The Court: Read it. Have in mind the particular form of the question, Mr. Beeson. It saves time.

(The reporter read the last question.) [121]

A. No.

Q. (By Mr. Simon): Now, do you have any independent recollection whether in this particular case there was the same form of application used for the bid bond as for the performance and payment bonds? A. No.

Q. I'll ask you whether it wasn't the usual custom when you knew of a case of this sort coming up to get the signature of the applicants on the form of application as soon as you could?

A. That is correct.

Q. And that form of application at that time would be treated as an application for a bid bond?

A. Right.

Q. And the same form would serve as an application for the performance and payment bonds?

A. It could, sir, yes.

Q. As I understand it, when a contractor—when you persuaded the contractor to get a bond by the application of—by the signing of this form for a bid bond in the first place, then later used that same application which he had already signed as his application for a performance and payment bond, there were necessarily a good many things that had to be filled in which were not available at the time of the application for the bid bond;

(Testimony of John C. Beeson.)

isn't that right? [122] A. That's right.

Q. And one of those things was the amount of the premium?

A. Well, in an application for a bid bond we only have a five dollar premium. The final premium could not be ascertained until we found out what the bid price was.

Q. I say if you subsequently filled in this information on the same form that had been submitted, as you have said was commonly done, the amount of the premium for the performance and payment bonds couldn't have been inserted at the time of the signing of that application by the contractor?

A. You say could not have?

Q. Could not have. A. That's right.

Q. Because the amount of the performance and bid bond premiums was dependent on the amount of and the duration of the contract which it was supposed to guarantee, wasn't it?

A. On the performance bond but not on the bid bond.

Q. No, but on the perform—the bid bond you could insert "\$5.00" or whatever was essential?

A. That's true.

Q. But on the performance or payment bonds the amount of the premium on those was dependent [123] or two, or at least one thing that couldn't be ascertained at the time of the submission of the bid bond? A. That's right.

Q. And that was the amount of the award, of the contract award, isn't that true?

(Testimony of John C. Beeson.)

A. That's true.

Q. And under government regulations a contractor who desired to bid on a contract was required to accompany his bid with a bid bond, and the condition of that bond was that if he were awarded the contract he would go through and execute the contract? A. Right.

Q. And then after such a contractor if he were successful was notified that he was the successful bidder, he would be sent a form or forms of contract for signature and be required to furnish performance and payment bonds, isn't that right?

A. That's true in some cases.

Q. Well, in this particular case that was true, was it not?

A. Well, I think that you'll find that they had to submit the bonds before they got the contracts.

Q. Well, to refresh your recollection isn't it a fact that the signed contracts and the performance and bid bonds were submitted to Alaska, I mean to the U. S. Engineers in Alaska with the same covering letter? [124]

A. That could be. I didn't see that covering letter.

Q. I see. And the notice to proceed would follow the receipt of both the signed copies of the contract and the performance and payment bonds?

A. That's customary.

Q. Now, what government regulation requires the insertion of the premium, the amount of the premium on these bonds?

(Testimony of John C. Beeson.)

A. That I couldn't tell you, what the number of it is. You just have to fill out the necessary spaces on the bond, and that is included as part of it.

Q. These bond forms are prepared by the government?
A. That is correct.

Q. And you assume from the fact that there was on the back of this bond a recital that the premium on it was blank dollars, that that was a government requirement?

A. That's not an assumption. I know that.

Q. Have you ever had it investigated by some accounting officer?

A. Yes, I've had that happen many times, have them come back and say that the wrong premium was charged or the wrong rate was.

Q. Was that on a cost plus contract or a lump sum contract, or do you know?

A. All ours were on lump sum contracts.

Q. Now, on this matter of the premiums, the non-board [125] companies have premium schedules too, do they not?
A. Yes, they do.

Q. And a non-board company bond would be acceptable in a situation like this?

A. Absolutely.

Q. And as a matter of fact you have in times past supplied to some of the men involved in this joint venture——

A. To some of them, yes.

Q. Let me finish. ——performance and payment

(Testimony of John C. Beeson.)

bonds on which non-board companies have been the surety? A. That is right.

Q. And specifically you have heretofore supplied for Mr. Loren Baldwin's company performance and bid bonds on which United Pacific was the surety? A. I have.

Q. And that was a non-board company?

A. Right.

Q. And the bond was accepted by the government? A. Yes.

Q. And the premium rate that appeared on those bonds was substantially below the premium rate which this Townsend — Town — Towner rate prescribed for the companies that adhered to that?

A. Yes.

Q. Now, calling your attention to these Exhibits 2, 3, 7 and [126] 10 again, Mr. Beeson, will you please refresh your recollection? They are before you? A. Yes, they are.

Q. They are signed United States Fidelity & Guaranty Company as surety? A. Yes.

Q. By J. C. Beeson? A. Right.

Q. And that is you? A. It is.

Q. And you signed as attorney in fact, is that what it says underneath it? A. Yes.

Q. And you were the attorney in fact of the United States Fidelity & Guaranty Company at the time you signed these bonds? A. I was.

Q. And you were authorized to and did affix the corporate seal of the United States Fidelity & Guaranty Company to those bonds?

(Testimony of John C. Beeson.)

A. Right.

Q. Now, Mr. Beeson, you told Mr. LeGros on his examination this morning that in May and June of 1955 you were associated with McCollister & Company?

A. That is right. [127]

Q. How long have you been associated with McCollister & Company?

A. Since 1933.

Q. And in what capacity?

A. All the way from office boy to vice president.

Q. And in May and June of 1955 you were the vice president of McCollister & Company?

A. One of them.

Q. Well, as vice president of McCollister & Company did you specialize particularly in this kind of work?

A. I did.

Q. And were you the specialist in this field for the company?

A. For McCollister & Company.

Q. Yes, that's what I mean. You were their specialist?

A. Yes.

Q. So that when Mr. Loren Baldwin and Mr. Martin Anderson wanted authoritative information about premiums and rates on bonds and insurance they came to you in May of 1955, as they had for some years last past?

A. They may have.

Q. Well, as a matter of fact you had similarly at the request of Martin Anderson and at the request of Loren Baldwin executed bonds of like character?

A. Time and again.

Q. Time and again? [128]

A. Yes.

Q. And you knew that they regarded you as the

(Testimony of John C. Beeson.)

prime authority on this whole subject, didn't you?

A. Well, as far as McCollister & Company was concerned.

Q. Yes. I mean you were McCollister & Company as far as they were concerned?

A. Well, bondwise.

Q. Yes. And McCollister & Company in turn were general agents, were they not, for United States Fidelity & Guaranty Company?

A. Yes.

Q. And they to your knowledge had been such for many years in this community?

A. Oh, yes.

Q. They were recognized as Mr. U. S. F. & G. in this territory? A. That's correct.

Q. Mr. Beeson, in May and June of 1955 and theretofore did you have stock interest in McCollister & Company? A. I did.

Q. Were you a stockholder? A. Yes.

Q. To what extent did you have stockholdings in McCollister & Company?

A. A minority stockholding. [129]

Q. Well, a substantial one?

A. It was to me.

Q. In the regular course of business of McCollister & Company, when McCollister & Company got an application of this sort for the execution of a bid bond and later on the same application filled it in and used it as an application for a payment and performance bond, as I understand it there was

(Testimony of John C. Beeson.)

no premium, separate premium, charged for the bid bond; am I right?

A. There was a separate premium charged for the bid bond if they were not the successful bidder.

Q. Yes. If they are, if the contractor who gives you this application for a bid bond becomes the successful bidder and you issue to him on this application a performance bond and a payment bond, you don't bill him, I mean you forget about any separate premium for the bid bond?

A. That is correct. If he had been billed for the bid bond he would receive a credit for it.

Q. Now, this business of the rates that you have testified to about the Towner manual, Mr. Beeson, that manual from which two pages have been admitted in evidence here as Plaintiff's Exhibit 11 and Plaintiff's Exhibit 12 is really quite a volume, isn't it?

A. Yes, it is. [130]

Q. And you have testified that in your opinion the rates for the kinds of bond here involved are to be found on Plaintiff's Exhibits 11 and 12, which are sheets out of this substantial volume?

A. That's right.

Q. But this business of determining in the volume itself what rates should apply to a given kind of bond and how to compute those rates after you find the kind of bond is a job that requires some expert skill, doesn't it?

A. I don't think it does, no. I was able to do it.

Q. Well, you have been in the insurance business for how many years?

(Testimony of John C. Beeson.)

A. Oh, about twenty in that branch of the business.

Q. Yes, and working with this regularly?

A. Right.

Q. Now, these Towner rates, for instance, distinguished between the rates for bridge bonds and Class A bonds and Class B bonds. Can you tell us offhand what distinguishes Class A bonds from Class B bonds?

A. Well, your Class B bonds are mainly heavy construction such as buildings, dams, work of that sort. Your Class A bonds are highway construction, —there's a hundred different classifications.

Q. In other words, there are various classifications that would come into a different schedule?

A. There are four classifications.

Q. And what are those four classifications?

A. Class A, A-1, B, and supply contracts.

Q. And briefly what are Class A contracts?

A. Oh, a Class A contract would be painting or an REA line, it could be most anything. In fact, there doesn't seem to be any rhyme or reason to it.

Q. And Class A-1?

A. Class A-1 would be something like manufacturing special equipment and supplying it.

Q. And Class B?

A. Class B is your heavy construction.

Q. And Supply?

A. Supply is a straight supply contract where some manufacturer agrees to supply a certain article.

(Testimony of John C. Beeson.)

Q. Now, you say that you've had some discussion with accountants in the government employ in the past about the rate being the proper rate. Would that have arisen because the rate that you applied was say a Class A-1 rate when it should have been a Class A?

A. That's true. Not only that, but also a mathematical error in the computation of the rate.

Q. Only a person with real familiarity with and who was possessed of these schedules would know how to figure these bonds, wouldn't he? [132]

A. He would certainly have to have the schedules.

Q. And they aren't commonly possessed by people generally, are they?

A. No. Usually just the industry; I mean the insurance industry.

Q. And when Mr. Anderson and Mr. Baldwin called you in to ask your advice about these things, you consulted your rate schedules?

A. That is correct.

Q. And they didn't have any? A. No.

Q. And you didn't tell them at any time ever, did you, that— A. Yes, I have.

Q. Now just a minute. I say you didn't tell them at any time ever that these rate schedules had to be on file with the Insurance Commissioner?

A. I don't remember if I ever did or not.

Q. You don't remember ever having told them that? A. That's right.

(Testimony of John C. Beeson.)

Q. Now will you please refer to Plaintiff's Exhibit 12.

(The exhibit was handed to the witness.)

Q. Can you tell from looking at that exhibit when it was filed?

A. It was filed July 20, 1955.

Q. Now, are you sure about that? [133]

A. It's what it says here.

Q. That's all you know about it?

A. That's right.

Q. Isn't it a fact, to refresh your recollection, that those rates were actually filed on July 5, 1955, to become effective July 20, 1955?

A. That I wouldn't know anything about.

Q. You wouldn't know anything about that?

A. No.

Mr. Simon: Do I understand, Counsel, in this connection that the pretrial order herein, Page 4, Paragraph XI, says, "That the document of which copy marked Exhibit b is attached hereto, being the plaintiff's premium rates as filed with the Insurance Commissioner of the State of Washington on the 5th day of July, 1955, for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in the above entitled action, is genuine," and so forth?

Mr. LeGros: I'm relieved to know there's something in this pretrial order that I can agree with you on—that you will agree with me on.

The Court: That is the vice of such a statement

(Testimony of John C. Beeson.)

between Counsel. The Court asks, in view of what Counsel said, do you approve of the statement there in [134] that pretrial order relating to that document?

Mr. LeGros: Yes, your Honor. We are advised by the Insurance Commissioner that the rating bureau filed this rate on July 5th for effect on July 20, 1955.

The Court: You may proceed.

Q. (By Mr. Simon): Mr. Beeson, didn't you know at least as soon as these new rates were filed with the Insurance Commissioner that this was to be the new schedule? A. No, I didn't.

Q. And when you told Mr. Anderson and Mr. Baldwin that the board companies were going to file new rates and that they would be at least competitive with the non-board companies, you were merely guessing?

A. Well, it was a good guess, as it turned out.

Q. Well, didn't you tell them as a matter of fact that you anticipated that this reduction would be as much as 25 per cent?

A. Well, the board—I mean the non-board companies were 25 per cent under the board companies. To meet them it would have to be 25 per cent.

Q. Yes.

The Court: What effect would that have on this premium in dollars and cents if that result took effect?

A. Do you want me to figure it out? I can [135] do it.

(Testimony of John C. Beeson.)

The Court: Can you state substantially?

A. It would be substantially around twelve thousand, plus or minus.

The Court: What balance would that leave over the rated figure you previously have testified to here as to what would be correct?

A. Around thirty-six thousand.

The Court: You may inquire.

Q. (By Mr. Simon): Now, I think you said that Mr. Anderson and Mr. Baldwin were interested in getting the bonds for the lowest price they could. A. Did I say that?

Q. Didn't you? A. I don't remember.

Q. Well, were they? Did they tell you that this was a contract where the competition would be keen and they were anxious to cut all of the overhead as much as they could in order that they could put in a bid that was competitive?

A. They might have told me that. That's true on every job.

Q. Well, you had, I think you've already testified, supplied Mr. Baldwin in times past with performance bonds with United Pacific as surety and on those bonds which were still available the premium would be 25 per cent less [136] than the premium on these board companies?

A. That is right.

Q. And isn't it true that what you said to Mr. Baldwin and to Mr. Anderson upon that occasion was that you were certain that the board companies

(Testimony of John C. Beeson.)

were going to reduce their premiums to be competitive with the non-board premiums?

A. That is right, but I did not know what date that would take effect.

Q. And didn't you tell them that as a consequence there was no use of them going to a non-board company, that if they would give you this application you would see to it that they got the benefit of this new reduced rate?

A. I do not remember saying that.

Q. Well, do I understand you to have testified on your direct examination that you told them that you would get them the benefit of this reduced rate if the rates were reduced before the bonds were delivered?

A. If the rates were reduced before, or became effective, rather, before the bonds were written.

Q. But you told them that if they were not, if the board companies didn't reduce their rates before these bonds were required, that if they signed this application they would have to pay this full 47,000, or the full rate which was 25 per cent more than the non-board rate? [137]

A. They would have to pay the regular board rate effective at that time.

Q. Well, was anything said, Mr. Beeson, to you by either of those gentlemen who were trying to cut down the overhead as to why they would run the risk of the non-reduction of the board rates when they could get the non-board bonds for 25 per cent less and be assured of it?

(Testimony of John C. Beeson.)

A. No. They could have had the non-board bonds.

Q. And isn't it a fact that the reason that they took the board rates rather than the non-board that they could have had for 25 per cent less was because you assured them that you would see to it that if they did they would get the benefit of this reduction?

A. The only assurance I made was that if the reduction was made before the bonds were written they would certainly have the benefit of it.

Q. Will you tell me this, please: What is the relationship between McCollister & Company as the general agency of the U. S. F. & G. with reference to these premiums? I mean to say as I understand it the contractor signs an application for the issuance of a bond by U. S. F. & G. in the normal course?

A. Yes.

Q. And in that form of application there is an agreement [138] to pay a premium, isn't there?

A. That's correct.

Q. Now, actually through the years that premium has not been paid by the contractor to U. S. F. & G.?

A. You mean as far as this Washington district here, Western Washington?

Q. Yes, that's right—no, as far as the jurisdiction of McCollister & Company is concerned.

A. It's paid to McCollister & Company.

Q. It's paid to McCollister & Company?

A. That's right.

(Testimony of John C. Beeson.)

Q. And McCollister & Company collects the premium and McCollister & Company becomes liable to the U. S. F. & G. for what percentage of that premium?

A. Well, the full premium less their commission.

Q. And how much is their commission?

A. That I couldn't say without looking at the contract.

Q. How long were you vice president of McCollister & Company?

A. About two or three years.

Q. In May and June of 1955 how much was the commission that McCollister & Company were entitled to deduct?

A. On that particular type of bond it varied. I couldn't tell you without looking at the contract.

Q. How much of McCollister's commission did you get for originating the business? [139]

A. None.

Q. Were you on a salary? A. Strictly.

Q. Your only interest in the commission was in increased earnings for McCollister & Company of which you were a stockholder and of which you were an officer? A. That's right.

Q. And you can't tell us now how much of a commission McCollister & Company was entitled to on these bonds that they wrote, that you signed and sealed for U. S. F. & G.?

A. I could guess at it.

Q. Well, I don't want a guess. I don't——

(Testimony of John C. Beeson.)

A. It's in the agency contract. It would be very simple to find out from there.

Q. Well, can you tell us any limits? You say that it's different on some contracts than on others.

A. Yes. For instance, the first two and a half million dollars take a certain percentage which I happen to know is 30. The next——

Q. 30 per cent on the first two and a half million?
A. Right.

Q. And——

A. The next two and a half million it drops down, I'm not sure whether it's 17½ or 12½, and the next two and [140] a half million the same way.

Q. I see. How low does it drop?

A. Down to five.

Q. Down to five per cent?
A. Yes.

Q. But on the first two and a half million 30 per cent of the premium is retained by McCollister & Company as commission?

A. No, not if they have to pay out to an agent.

Q. Well, you were the originating source of this business, weren't you?

A. But that's a general agency.

Q. Well, did they pay out any commission to anybody else on the Martin Anderson bond?

A. No.

Q. So that they got 30 per cent of the premium on the first two and a half million of this bond?

A. For three-quarters of it.

Q. Yes.

A. One quarter would go——

(Testimony of John C. Beeson.)

Q. You're talking now about the fact that Ancel Earp was injected into the situation?

A. That's right.

Q. Do you know how much the total agency commission on this bond which was payable — no, what the total agency [141] commission on this bond was? A. I do not.

Q. Did you ever know? A. Yes, I did.

Q. You've forgotten?

A. You don't keep those things in your mind for two years.

Q. You can't give us a reasonable approximation? A. No.

Q. Now, did you see Mr. Martin Anderson at any time after these bonds were delivered?

A. Many times.

Q. I'll ask you whether it isn't a fact that these bonds were actually delivered on or about the 13th day of June?

A. It's possible. I couldn't tell you one way or the other.

Q. The fact that they were dated the 3rd day of June, if that's the fact, doesn't indicate that that was necessarily the date of delivery?

A. No. The government tells you what date to date the bonds and contracts and you use their date.

Q. You date them back to a preceding date, the date of the award?

A. Well, it's not always the date of the award, but some date the government tells you to do, yes.

Q. Did Mr. Anderson ever complain to you

(Testimony of John C. Beeson.)

about the fact that these bonds were being billed or invoiced to the [142] joint venture at a different rate than had been agreed on between you and him?

A. Well, if he did that, that was a misunderstanding because that was the rate agreed on.

Q. Well, did he ever complain to you that he was being overcharged on the bond rate?

A. He might have.

Q. Well, do you have any independent recollection of that at all? A. No.

Q. "No", did you say? A. No.

Q. I'm sorry, I didn't hear you. Well, don't you recall that Mr. Anderson did complain to you that he was being overcharged and that the rate was higher than you had told him it would be, and isn't it a fact that you told him that you felt sure that something could be done about it?

A. No, that is not a fact.

Q. Did you ever tell either Mr. Anderson or Mr. Baldwin that you felt that this disagreement about the amount of premium due could be adjusted?

A. I told him that we would do the best we could for them, which we did.

Q. But you say you didn't tell him that you thought it [143] could be adjusted?

A. I said I hoped it would be adjusted.

The Court: What adjuster did you have in mind when you said that, if you recall?

A. We went to the home office of the U. S. F. & G. and they took it up with the Towner Rating Bureau. The Towner Rating Bureau said no. So the

(Testimony of John C. Beeson.)

U. S. F. & G. had nothing they could do but say no either.

The Court: You may proceed.

Q. (By Mr. Simon): Did you ever report to the U. S. F. & G. that you had had this oral agreement with Mr. Anderson and Mr. Baldwin that you would see to it that they got the benefit of the reduced rate?

A. If the rate came out and was effective before the bonds were written.

Q. Did you make that in the form of a written report? A. You mean to Baltimore?

Q. Yes. A. No, I don't believe so.

Q. To whom in the U. S. F. & G. organization did you report that you had this oral agreement with Mr.—

A. I did not report that there was any oral agreement. I asked them if there couldn't be some adjustment made.

Q. In asking them that, or when you asked them that did you tell them that you had had this oral agreement with Mr. [144] Baldwin and Mr. Anderson that you would see to it that they got the benefit of the reduced rate?

A. I didn't have that oral agreement.

The Court: I believe the question was did you tell them what was stated in the question.

A. I did not tell them.

Q. (By Mr. Simon): But you did ask that they consider an adjustment?

(Testimony of John C. Beeson.)

A. Either I did ask or someone else in the office did ask.

Q. Because Mr. Anderson and Mr. Baldwin had been misled by something you told them?

A. Just because we thought that they were entitled to the adjustment of the premium, not because they had been misled.

Q. I see. Because they were entitled to the adjustment? A. I thought they were.

Q. Was that because the premium was calculated on a two year term, of which only one month had expired?

A. That had something to do with it.

Mr. Simon: No further questions on cross examination of this witness, your Honor.

The Court: Is there any redirect examination?

Mr. LeGros: I have no redirect.

The Court: You may be excused from the stand.

Mr. LeGros: If the Court please, may Mr. [145] Beeson be excused subject to recall if Mr. Simon wants him? I know he has lots of business to take care of.

Mr. Simon: I have no objection to that, your Honor.

The Court: Mr. Beeson, will you try to make yourself available in case you are called again?

A. Yes.

The Court: Subject to that Mr. Beeson is excused and may go about his business at this time.

(Witness excused.)

The Court: I think we better take the mid-

afternoon recess at this time. The jury will retire to the jury room for about ten minutes, during which time you will have your midafternoon recess. I wish Counsel to remain, if they will, kindly.

(The following proceedings were had without the presence of the jury:)

The Court: I wish to give Counsel an opportunity of further presenting their respective positions regarding this Plaintiff's Exhibit 1. Would you come forward, Mr. Simon? I think we can expedite the matter.

Mr. LeGros: If your Honor please, it is our view that Plaintiff's Exhibit 1 is a written document, it's signed by the parties and they have identified their signatures. There is a question as to the insertion of [146] material. I think that is a matter now for the jury to decide. It is an issue of fact whether or not that was in there at the time or whether it was not.

As a written document I think it has been properly identified and the weight which the jury gives it is now the question.

The Court: I wish you would recount what you think the evidence is in addition to that identifying the execution of it. What do you recall of the testimony as to the other matters at issue respecting that document, that is, whether the words were in there at the time it was signed and delivered?

Mr. LeGros: I think you are now referring to the figures.

The Court: Yes.

Mr. LeGros: Forty-seven thousand some odd

dollars. Mr. Anderson first testified they were not there, subsequently he testified in accordance with his deposition that he didn't know whether they were there. Then the testimony of Mr. Katz was I think rather categorically that they were not there. The testimony of Mr. Beeson was that they perhaps were there and that in the usual custom of his office with a bond of this size they would be there. The testimony of Mr. Montin, which is not yet in evidence, in his deposition is that [147] he doesn't know.

I think that creates a question of fact. As a written document it's complete and unambiguous on its face. The parties have by parol attempted to show what ambiguity, if any there existed, was. I think it has now become a question of fact.

The Court: Mr. Simon, may I hear your statement of what you think the record is now on this question of proper authentication?

Mr. Simon: I think——

The Court: Or lack of proper authentication for admission.

Mr. Simon: I think, if the Court please, that aside from the matter of emphasis, I do not disagree substantially with what Mr. LeGros has said. Mr. Anderson said that as far as this premium was concerned he didn't think it was in there and yesterday, having thought it over, he testified categorically that it was not there. I don't think that that raises any issue. Mr. Katz testified categorically that it was not there, and your Honor has very recently heard the testimony of Mr. Beeson. Mr. Bee-

son said he didn't know whether it was there or not and that it couldn't have been there if this was signed as an application for a bid bond, that customarily when they have an application for a [148] bid bond from a joint venture like this they subsequently filled it out and used it as an application likewise for the performance and payment bonds.

Now, I think that in the light of this ninth paragraph, "That the Company may fill up any blanks left or correct any errors in filling up any blanks herein or in the said foregoing statements, and such insertions or corrections shall be prima facie correct," may, coupled with the fact that we did sign this and are presumed to have read it, be sufficient to entitle it to admission, and it is a sufficiently close question so that I don't want to urge the Court to exclude it.

The Court: Aside from the last few words of Mr. Simon's statement the Court is of the opinion that the evidence does show that this exhibit is admissible on the present record. The Court is of the opinion that it should be admitted, and now intends to rule on the offer admitting it upon the return of the jury to the courtroom. If the Court overlooks it temporarily, will you remind me of it?

Mr. LeGros: Yes, your Honor.

The Court: Court is now at recess for at least ten minutes.

Mr. LeGros: Pardon me. May I ask the Court how long you intend to go to? I have just one more [149] witness.

The Court: Is that a deposition?

Mr. LeGros: I have a deposition, but it's short.

The Court: How long will the witness take?

Mr. LeGros: Depending on Mr. Simon's cross examination I'm sure Mr. Friday will be short on direct.

The Court: We will continue to at least 4:30, maybe a few minutes later if by doing so we can finish with the witness then on the stand.

Mr. LeGros: Thank you.

The Court: Court is now at recess.

(Short recess.)

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. The offer of Plaintiff's Exhibit 1 for identification having been further considered, the same is now admitted, the objections thereto being overruled.

(Plaintiff's Exhibit No. 1 for identification was admitted in evidence.)

Mr. LeGros: I would like at this time to call Mr. Nelson Friday.

The Court: Come forward and be sworn as a witness. [150]

NELSON FRIDAY

called as a witness by plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. LeGros): Would you state your name in full? A. Nelson Friday.

Q. And you reside where, Mr. Friday?

A. In Seattle.

(Testimony of Nelson Friday.)

Q. Will you give us the street address?

A. 3047 42nd West.

Q. What is your occupation, sir?

A. I'm president of McCollister & Company.

Q. And how long have you been president of that concern? A. Since January, 1955.

Q. Mr. Friday, how long have you been engaged in the insurance and bonding business?

A. I've been engaged in the insurance and bonding business since 1923.

Q. And how many years of that time have been spent with McCollister & Company?

A. Since August of 1949.

Q. Could you state to us whether or not McCollister & Company represents exclusively the United States Fidelity & Guaranty Company? [151]

A. McCollister & Company at the present time represent exclusively the U. S. F. & G. In 19—that's deviating from your answer, but in 19—we have represented other companies. We did not represent U. S. F. & G. exclusively in 1955.

Q. How many companies did you represent in 1955?

A. We represented five companies, or six companies. We represented United States—U. S. F. & G., we represented the General Insurance Company, we represented the United Pacific Casualty Company, we represented the Empire State Insurance Company of Watertown, New York, we represented the Mercury Insurance Company and the Hartford Steam Boiler.

(Testimony of Nelson Friday.)

Mr. LeGros: If the Court please, may the record show that hereafter when we refer to U. S. F. & G. we are referring to the United States Fidelity & Guaranty Company?

The Court: Let the record show that.

Q. (By Mr. LeGros): Now, Mr. Friday, it has been testified to that McCollister & Company is a general agency. Could you tell us how an agency is distinguished from an individual insurance agent?

A. A general agency has the privilege of appointing subagents. In other words, in laymen language the general agency is the wholesaler and as custom in the past had [152] it they used to be wholesalers and retailers. The modern trend of the general agency is to be wholesalers exclusively, within the past several years.

Q. And in 1955, however, McCollister & Company acted as both wholesaler and retailer?

A. In 1955 we acted both as wholesalers and retailers.

Q. Now, Mr. Friday, in your capacity as president of U. S. F. & G. (sic) and your familiarity with the insurance business from your long association with it, are you familiar with the practice of filing rate schedules with the State of Washington?

A. Yes, sir.

Q. And is it necessary for each insurance company writing business in this state in the bond field to file a rate schedule or to have such a rate schedule filed on its behalf?

A. It is, sir.

(Testimony of Nelson Friday.)

Mr. Simon: That's objected to as irrelevant and immaterial, if the Court please.

The Court: The objection is overruled.

Mr. Simon: May we have our preceding stipulation to avoid interrupting?

The Court: A continuing objection?

Mr. Simon: Yes, your Honor.

The Court: You may have that. [153]

Mr. LeGros: That's quite agreeable.

The Court: You may have that. That is approved.

Q. (By Mr. LeGros): Do you have the question in mind? A. Yes.

Q. And what is your answer, sir?

A. It is necessary that they have rates filed.

Q. And how can those rates be filed?

A. The rates are submitted by either individual companies or by rating bodies to the Insurance Commissioner's office at Olympia.

Q. With what rating body was U. S. F. & G. associated in May and June of 1955?

A. The Surety Association of America. It's quite frequently referred to as the Towner or the board companies.

The Court: How do you spell the word "Towner?"

A. Your Honor, I think it's T-o-w-n-e-r.

My spelling is not usually very good.

Q. (By Mr. LeGros): Mr. Towner for many

(Testimony of Nelson Friday.)

years was president or organizer of the Surety Association?

A. That is where the name Towner originated. He was the gentleman who was the head of it many, many years ago, and the Surety Association of America is an outgrowth of that.

Q. And is it customary, Mr. Friday, in the field of bonds [154] for rate schedules to be changed at periodic intervals?

A. As far as bonds are concerned, no. Changes in bond rates are extremely rare. In my personal knowledge I know of very few changes in bond rates. They remain fixed for many years.

Q. Now, handing you what has been marked as Plaintiff's Exhibit No. 11, which is a rate schedule, could you tell me what was the effective date of that rate schedule which you hold?

A. The effective date of this revision was April the 30th, 1951.

Q. And do you know of your own knowledge, Mr. Friday, to what date that rate schedule was effective?

A. This particular page was effective until July the 20th, 1955.

Q. Is that the date upon which the new rate schedule went into effect?

A. That is the date on which the new rates were to be effective.

Q. Now, Mr. Friday, in filing these rate schedules with the Insurance Commissioner and in the case of the board companies associated with the Surety

(Testimony of Nelson Friday.)

Association of America, do the member companies know the rate schedule that is being contemplated?

A. The actual filing of those rates are made by the Surety [155] Association of America direct with the Commissioner on behalf of the members of the Association or the surety companies.

Q. And prior to the effective date do the members of the Association know what the rate will be?

A. They do not reveal it to the—except the members that set on the committee that decides on the particular changes.

Q. In other words, the Association acts through a committee of the various members?

A. That's right. They get the approval of the committees on these things and they are filed with the Commissioner at that time.

Q. Now, it's an admitted fact in this case, Mr. Friday, that this 1955 revision was filed on July 5, 1955.

A. That is correct.

Q. When was the rate schedule announced to the trade?

A. The rate schedule was not announced to the trade until July the 20th. I say July 20th. Sometimes we get them in one day in advance or two days. They are always timed, or they are purposely mailed in such a way as to reach the trade within a day or not more than two in advance of the effective date.

Q. And why is that, Mr. Friday?

A. That is for the purpose of arranging any jockeying or [156] manipulating. In other words,

(Testimony of Nelson Friday.)

when the rate is effective it's to be effective on that date, and all members of the committee are expected to follow it from that date. If it became common knowledge in advance there might be some jockeying on the thing.

The Clerk: Plaintiff's Exhibit No. 13.

(A card entitled Members of The Surety Association of America was marked Plaintiff's Exhibit No. 13 for identification.)

The Court: Where is the head office of the Surety Association you mentioned?

A. It's in New York City.

Q. (By Mr. LeGros): Mr. Friday, handing you what has been marked as Plaintiff's Exhibit 13, can you tell me what that document is, please?

A. That's a list of the members of the Surety Association of America, those members that adhere to the rating schedules and formulas as filed by the Surety Association.

Q. And does that include the United States Fidelity & Guaranty Company? A. It does, sir.

Mr. LeGros: I will offer Plaintiff's Exhibit 13.

Mr. Simon: It's objected to as irrelevant and immaterial. [157]

The Court: Overruled. That exhibit is now admitted.

(Plaintiff's Exhibit No. 13 for identification was admitted in evidence.)

The Court: Will you state again what that exhibit is? Give it the shortest name you can think

(Testimony of Nelson Friday.)

of but let the name of it reflect the information contained in it.

A. List of the members of the Surety Association of America.

The Court: Membership list?

A. Yes, sir.

Q. (By Mr. LeGros): Now, Mr. Friday, what proportion of the surety business in the United States is written through board companies, if you know?

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: On what issue is that——

Mr. LeGros: This is merely background.

The Court: The objection is overruled.

A. I couldn't state positively, it varies between the years. I would venture the guess that it would be somewhere between 65 to 75 per cent.

Q. (By Mr. LeGros): And in the State of Washington?

A. In the State of Washington that's not true. There's a [158] much larger percentage that's written by the non-bureau companies.

Q. And do you think that was one of the factors which may have influenced the rate change of 1955?

Mr. Simon: Objected to as leading and speculative and immaterial.

The Court: That is sustained.

Mr. LeGros: I'll strike the question.

Q. (By Mr. LeGros): Mr. Friday, in your

(Testimony of Nelson Friday.)

organization how many attorneys in fact did you have in 1955? A. We had four.

Q. And who were they, please?

A. Mr. Beeson, myself, Don Rogers and Miss Lotta Hershey, a young lady who's been with us for some thirty years.

Q. And those people are empowered to do that under that authority?

A. They have the power of attorney to affix their seal and act on behalf of the company as far as surety matters are concerned.

Q. That would be on behalf of the United States Fidelity & Guaranty Company?

A. That is correct, sir.

Q. Now, Mr. Friday, on these bonds in issue, which involved a liability of in excess of six million dollars, does the United States Fidelity & Guaranty Company insure [159] that entire liability itself?

Mr. Simon: Objected to as irrelevant and immaterial.

Mr. LeGros: It's preparatory to——

The Court: It is overruled.

A. They do not.

Q. (By Mr. LeGros): And how do they not cover that entire liability itself?

A. They are the originating company on a bond of that type and they will carry a portion of the bond themselves and reinsure the balance.

Q. Could you explain for the jury what is meant by reinsurance?

(Testimony of Nelson Friday.)

A. Well, reinsurance is a matter in—to cite an example, on a bond they may agree that they wish to carry 25 per cent of the overall exposure under the bond themselves. They will arrange with other companies to assume the remaining 75 per cent. Each company takes a portion of the premium, their proper proportion of the premium, and assumes the proper proportion of any losses that may result from that primary bond.

Q. Now, in the case of a bond such as we have here filed with the United States Government, is it necessary that the reinsurance be arranged prior to the execution of the bond? [160]

A. It is necessary, because once you write a bond no bonding company is going to go in and reinsure you after the bond is written. It would be like insuring something after a loss occurred or where it might occur. They like to have a look at all the facts before the bond is committed.

Q. Now, Mr. Friday, in this particular case of the two bonds in question here, the payment bond and the performance bond, was reinsurance arranged for these bonds? A. Yes, sir.

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. LeGros): And could you tell us approximately when this reinsurance was arranged?

A. Well, the reinsurance would be arranged for prior to the time that the bid bond was issued. In this particular case I can't recall all these dates

(Testimony of Nelson Friday.)

just offhand, but it was undoubtedly sometime shortly prior, I'd say approximately a week prior to the time the bid bond was provided and the bids submitted, bids opened.

Q. At that time did the United States Fidelity & Guaranty Company know the exact amount of the bid or what the exact amount of the contract would be?

A. No, we do not know, we prefer not to know the exact [161] figures. We like to have an upper limit. The contractor will tell us that the job may run as much as X dollars, because he doesn't wish to reveal his exact figures to us and we like to know—quite obviously we've got to know the maximum amount that we're going to bid exposure for.

Q. And was that done in this case? A. Yes.

Q. What was the maximum amount?

A. As I recall it was around some seven million dollars.

Q. And with how many companies did United States Fidelity & Guaranty Company arrange for reinsurance?

Mr. Simon: If the Court please, may I have a continuing objection to this line of inquiry upon the ground and for the reason that the same is not relevant or competent to any issue in this case?

Mr. LeGros: I think it will come out.

The Court: I think you ought to state what the issue is now that this has a material bearing on.

Mr. LeGros: Yes, your Honor. I will show by this witness that the reinsurance was arranged with

(Testimony of Nelson Friday.)

the various reinsurers prior to the execution of the bond at the rate of premium that was charged to the defendant in this action. In other words, that the United States Fidelity & Guaranty Company incurred a [162] very substantial liability for 75 per cent of the premium charged to various insurers prior to the time of the execution of this bond.

Mr. Simon: If the Court please, it is our position that there isn't anything in the pleadings that raise any such issue, and it's irrelevant and immaterial. How they handled the premium that they contracted to get from us is of no primary concern of ours, any more than it's a concern of ours as to how much Mr. Friday deducted and how much the home company got of the premium that we agreed to pay. And the fact that they went through this elaborate arrangement with other companies may mean that the local office, Mr. Beeson didn't fully report what had transpired, but it seems to me that what arrangements they made with other companies is entirely irrelevant and immaterial to any issue in this case.

The Court: The objection is overruled. The Court asks you to be as brief as possible. I note that it is nearly four o'clock.

Mr. LeGros: Yes, your Honor. I have just a few more questions.

Q. (By Mr. LeGros): What percentage of this risk did United States Fidelity & Guaranty Company retain?

(Testimony of Nelson Friday.)

Mr. Simon: May it be understood again that as [163] to this new line of inquiry my objection heretofore stated continues?

The Court: Is there any objection?

Mr. LeGros: No, your Honor.

The Court: Very well, the Court approves of that. Will you read the question? I did not hear it.

(The reporter read the question as follows:

“Q. What percentage of this risk did United States Fidelity & Guaranty Company retain?”)

A. They retained——

The Court: The word “did,” is that——

Q. (By Mr. LeGros): What percentage of the risk did United States Fidelity & Guaranty Company retain?

A. They retained 25 per cent of the risk themselves.

Q. And among how many companies was the remaining 75 per cent spread?

A. There was 50 per cent of it that was spread between six different companies, and then 25 per cent of it went into what they call treaty arrangements in which there are groups of companies that assume certain amounts. I can't say how many member companies are in that treaty. It's a treaty arrangement that they have. It's like a joint venture in the contracting business. In other [164] words, we minimize our exposures.

Q. Now, in spreading this risk, Mr. Friday, did you report a premium to these other companies?

(Testimony of Nelson Friday.)

A. Yes, we did.

Q. And what premium was reported?

A. The forty-seven thousand some odd dollars that has been referred to here quite frequently.

Q. And did that premium form the basis upon which you would have to account in payment to the various other members among whom you spread this risk?

A. That is correct. All your reinsurance is arranged for at the rate that is in effect in the state so that it will not be discriminatory at the time that the bond is executed.

Q. And did the United States Fidelity & Guaranty Company become obligated to those other companies for premiums in that amount?

Mr. Simon: I object——

A. That is correct, for their pro rata proportion of it.

The Court: Just a moment.

Mr. Simon: I object to that as leading.

The Court: The objection is sustained. The answer to the question is stricken and the jury will disregard it as if you never had heard it. Proceed.

Q. (By Mr. LeGros): Did the United States Fidelity & Guaranty [165] Company incur any obligations to these companies who were now sharing the risk? A. Yes.

Q. What was that obligation?

A. They incurred an obligation to those companies to share with them their pro rata propor-

(Testimony of Nelson Friday.)

tion of the total premium that had been accepted on the bond or written on the bond.

Q. Mr. Friday, when was it that you first discussed the dispute which arose between the joint venture and U. S. F. & G. with the members of the joint venture?

A. My personal discussion of it, the first time that I personally got into the matter, as I recall it, was along in November or sometime in that date.

Q. And with whom did you discuss this matter?

A. My discussion at that time was with Mr. Baldwin and Mr. Oja.

Q. And did you in response to a request from Mr. Baldwin set out in a letter the full basis of your position in this suit?

A. Yes. I—he asked me at the time if I would give him the varying rating bases that would apply, the different dates that they would apply, the amount of the premiums and so forth, and I set out as carefully as I could the complete information and how we arrived at the various [166] rating bases.

Q. And that letter was sent to Mr. Baldwin approximately about what time?

A. The latter part of the year. Now, it was along in November or December of 1955. I can't recall the exact date. I recall that I didn't get into it until the premium became delinquent.

Mr. LeGros: You may examine.

The Court: Cross examine.

(Testimony of Nelson Friday.)

Cross Examination

Q. (By Mr. Simon): Mr. Friday, in this matter of the delinquency of the premium, I'll ask that you be furnished with a copy of Defendant's Exhibit A-1.

The Court: That will be done.

(The exhibit was handed to the witness.)

A. Yes, sir.

Q. (By Mr. Simon): Were you familiar with the fact that such a letter had been written?

A. I was not familiar with this letter at the time it was written, no, sir.

Q. That is a letter from your office concerning this matter?

A. It is a letter from our office and it is standard procedure for our treasurer to look after the collection [167] of premiums. I personally can't do those matters myself and I rely upon the boys to take care of it for me, sir.

Q. That letter was sent by your treasurer?

A. By our treasurer, yes, sir.

Q. And it provided for the payment of the premium of \$35,000 plus therein specified in three installments and asked that the first of those three installments be paid, did it not?

A. Yes, sir, it provides for the amount due here of \$35,815.29 which was McCollister & Company's proportion of the premium for the bond.

Q. And it provided or requested that that sum of \$35,000 be paid in three equal installments?

A. That is correct.

(Testimony of Nelson Friday.)

Q. And said that this was the understanding between the parties?

A. Basically that, yes, sir.

Q. It says, "In accordance with our understanding we respectfully request that you now remit to us the first of these thirds?" A. That's correct.

Q. And very promptly after this letter was received by Islands Construction Company your company got the first check for eleven thousand and some dollars? A. That's correct, yes, sir. [168]

Q. And thirty days thereafter or thereabouts your company got a second installment of one-third of that amount? A. That's right.

Q. An equal amount of eleven thousand plus?

A. Correct, sir.

Q. Which would have been in October?

A. I assume that it was in October, sir. I don't——

Mr. Simon: Well, while we're about it may the witness be shown Plaintiff's Exhibit 6?

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): Those have been introduced in evidence in this case as having been the vouchers attached to the receipts, I mean the vouchers which formed a part of Islands, Anderson and Montin's checks which were made in payment to McCollister & Company of this premium?

A. That's correct.

Q. And then in the upper left-hand corners of these two slips are some dates?

(Testimony of Nelson Friday.)

A. There are some dates, and very frankly those dates, because of my familiarity with our treasurer's handwriting, appear to be his handwriting and possibly the dates on which they arrived in our office at that time. That would be my guess. Now, I'm just assuming that.

Q. That's based on your knowledge of your office procedure? [169]

A. I would say that the one check from this thing here, knowing the handwriting and everything, arrived at our office on September the 19th, the second installment arrived there on October 21st, sir.

Q. And the 19th is about four days later than this instrument, Defendant's Exhibit 6?

A. September the 14th, that's correct, they received it on the 15th.

Q. So that the next payment which you would have expected to have received pursuant to the terms of this letter would have been—you would have anticipated receiving sometime around the middle of November? A. Correct, sir.

Q. And when you did not receive that, that was about the time that you became personally interested in this problem?

A. Yes, sir, as far as I know, sir.

Q. Now, do you have any idea of where Mr. Beeson got the information which he gave to Mr. Anderson and to Mr. Baldwin in early May or sometime in May at the time of the discussion of

(Testimony of Nelson Friday.)

this bid bond to the effect that the board companies were going to reduce their rates so that they would be competitive with the non-board companies in the State of Washington?

A. Mr. Simon, we're always looking for business in this [170] area, and the non-board companies out here have been after us for a long time, and for many years those of us that operate basically through board companies connections have not been satisfied with the pro rata portion of the business that we got in this area. We felt that we were entitled to a better percentage of it and we saw no reason why our competitors should take it away from us at what we referred to as a lesser rate. We tried for many years and have tried for many years to overcome that competition. It's not been a matter that's come to a head within just a short time. They've advocated for many years meeting that competition, and there was considerable agitation on the part of these companies to get in here and compete with these companies so that we could get our same proportion that they were getting in the eastern states. That thing was beginning to come to a head.

The Court: I believe that is sufficient.

The Witness: I'm sorry. All right. Thank you, sir.

The Court: Ask him another question.

Mr. Simon: Very well, your Honor.

Q. (By Mr. Simon): Mr. Friday, if this bond or these two bonds or these three bonds, one pre-

(Testimony of Nelson Friday.)

mium covered the three bonds, as I understand it—— [171] A. Three bonds?

Q. Yes, the bid bond, the payment bond and the performance bond.

A. Yes, sir, that's correct. If you include the bid bond, that's right.

Q. If this bond had been written by Mr. Beeson and by your company in the United Pacific Casualty Company rather than the United States Fidelity & Guaranty Company, what would have been the commission that accrued to your company?

A. It would have been—we get the same percentage of commission as we get, but it would have been on a lesser premium basis. It would have been on the basis of the premium that they used. I can't——

Q. So that roughly your own commission would have been substantially 25 per cent less than it was?

A. It would have been at the reduced rate used by the non-board companies, correct, non-Towner companies, the non-board companies, correct, sir.

Q. Yes. Now, can you tell us what your commission, the commission of McCollister & Company, would be if the premium on these bonds were calculated at the amount which was inserted by your company in Plaintiff's Exhibit 1?

A. In actual dollars and cents? [172]

Q. Yes.

A. I can't tell you in actual dollars and cents because it's——

(Testimony of Nelson Friday.)

Q. Well, can you tell us within a thousand dollars?

A. It would be somewhere around six or seven thousand dollars. I can't figure it out exactly here. I could get the exact figures if they will be pertinent. The reason I say that is because it's on a varying scale, and it's not on a fixed schedule. As Mr. Beeson pointed out in his testimony, your scale of commissions was 30 per cent on the first two and a half million dollars of the bond, and from there on it grades down.

Q. How much was the premium on the first two and a half million of this bond?

A. Oh, I'd have to figure the thing out. There's a letter here in the place, in the office, that will show it to me, but—you have a copy of it and so do we.

Mr. LeGros: Is that set out in your letter of December 28th?

A. I think I could calculate it from there in less time than I could from any other letter.

Mr. LeGros: Do you want to offer the letter of December 28th? I have a copy of it here, Mr. Simon, if you want to—well, go ahead, use yours.

Mr. Simon: That's fine.

Mr. LeGros: Go ahead, I'd just as soon have [173] the original anyway.

The Court: Let it be marked.

The Clerk: It will be marked Defendant's Exhibit No. A-2.

(Testimony of Nelson Friday.)

(A letter was marked Defendant's Exhibit No. A-2 for identification.)

The Court: Give him a chance to give the document a name that reflects the nature of its information.

Q. (By Mr. Simon): Calling your attention to what has been marked for identification as Defendant's Exhibit A-2, Mr. Friday, I'll ask you whether that is the letter which you referred to on your direct examination as having been written to Mr. Loren Baldwin's company regarding this matter?

A. Yes, sir, that is the letter.

Q. And it's dated——

A. I see here it's dated December 28th.

The Court: What subject does the letter pertain to? A. It's a rate comparison.

Q. (By Mr. Simon): Now, using those figures can you roughly calculate what premium McCollister & Company expected to acquire on the issuance of this bond by U. S. F. & G. if the premium charged was 47,000? [174]

(Witness computing.)

A. If we had received credit for the full \$47,000 premium in our office——

Q. Yes.

A. And had not charged 25 per cent to Oklahoma City, the total premium on that, the total commission on that would have been around some eighty — oh, I'd say eighty-two, eighty-three hundred dollars. Now, I'm just——

Q. Eighty-two to eighty-three hundred dollars?

(Testimony of Nelson Friday.)

A. That's correct, sir, if that's accurate enough.

Q. And to repeat somewhat, if the board company rate were reduced 25 per cent to make it competitive with the non-board rate, the commission that you would actually have received would be approximately two thousand dollars less?

A. Roughly two thousand dollars less, that's accurate enough, yes, sir.

Q. Mr. Friday, following the receipt of your letter that you have identified as Defendant's Exhibit A-2 there were tendered to your company and to Ancel Earp of Oklahoma City checks for the total amount shown by the—the balance shown by the lesser calculation, were there not?

A. I can't say about Ancel Earp. I can say as to our office, we did get a check in, which was carefully and [175] meticulously drawn to indicate that it was final payment on the bond, which check was returned.

Q. Now I'll ask you whether you wrote a letter returning that check in which you said, "According to our information"—

Mr. LeGros: I'll object, if the Court please. If he's going to read from the letter, he should offer it.

Mr. Simon: Your Honor, I'll ask this gentleman whether he recalls having written any letter at any time which contained words substantially of the following import: "According to our information, pursuant to similar instruction"—

Mr. LeGros: The same objection.

The Court: The objection is sustained.

(Testimony of Nelson Friday.)

Q. (By Mr. Simon): Well, did you ever tell or communicate with Islands, Anderson and Montin-Benson and tell them that you had information that Ancel Earp & Company were going to return their check also?

A. I wrote them a letter returning our check, and I cannot recall exactly what was in the letter. You have a copy of it there, sir, quite obviously.

Q. You don't recall whether there was anything like that in the letter or not?

A. I don't specifically remember the exact wording of the [176] letter, no, sir. I cannot recall it word for word.

Mr. Simon: Well, to shorten this I think it is agreed, is it not, Counsel, that checks totalling the amounts——

Mr. LeGros: I had agreed with you on that at the recess, Mr. Simon.

Mr. Simon: Yes.

The Court: You may proceed.

Mr. Simon: And that the total amount has been—the tender represented by those checks has——

Mr. LeGros: Is on deposit with the Clerk of Court. I have agreed to that, too.

Mr. Simon: Fine.

Q. (By Mr. Simon): Mr. Friday, I'll ask you whether in discussing this matter with Mr. Loren Baldwin you did not say to him in substance and effect that it would have been a simple thing for you to have adjusted this conflict were it not for the fact that other companies had now become involved

(Testimony of Nelson Friday.)

in it or that other companies than U. S. F. & G. were involved?

A. I certainly cannot recall making any such statement to that effect, no, sir.

Q. You didn't say——

A. In other words,——

Q. You didn't ever say to Mr. Baldwin that if the U. S. F. [177] & G. had not reinsured with other companies this matter could have been adjusted?

A. Well, I would certainly be very foolish to make such a statement.

The Court: No, no, do not argue, just say whether you did or not.

A. I do not recall making any such statement of that type, no, sir.

Q. (By Mr. Simon): Would you say that you didn't make such a statement?

A. I would say that I did not make such a statement.

Q. Very well. Do you recall offhand when the bid bond in this case was executed?

A. I personally do not, because I don't get into the detail handling of these things. No, sir, I do not.

Q. But the reinsurance had been effected, I think you testified, prior to the execution of the bid bond?

A. That's right. Arrangements had been made for adequate reinsurance prior to the arrangements of the bid bond.

Q. This bid bond to which you have referred

(Testimony of Nelson Friday.)

was executed after the execution by the signers thereof of Plaintiff's Exhibit 1, the application for bonds?

A. Well, I can't tell you the exact dates of these things because I personally didn't handle them.

Q. No. [178]

A. All I could go by would be what our standard procedure is. If you wish that I'll be very happy to tell you.

Q. Yes. Well, your standard procedure would indicate that you wouldn't issue a bid bond until you had the acceptance on file.

A. We don't have written acceptance, we have commitments from the various companies as to what percentages they are willing to accept.

Q. No, you and I are talking about different things.

A. O. K., let's—you get it clear and I'll answer you the best I can.

Q. I'm talking about Plaintiff's Exhibit 1, which was an application for the issuance by U. S. F. & G. of bonds.

A. Correct.

Q. That was originally submitted as an application for a bid bond?

A. Correct, sir.

Q. And I say that was executed by the people who signed it before you actually executed and delivered a bid bond pursuant to it?

A. Quite obviously, yes, sir.

(A bid bond was marked Defendant's Exhibit No. A-3 for identification.)

(Testimony of Nelson Friday.)

Q. Yes. Now calling your attention to what has been marked for identification as Defendant's Exhibit A-3, I'll ask [179] you whether you recognize that as the bid bond which your company executed in connection with this matter?

A. Yes, it is, sir.

Q. Can you from an examination of that instrument tell us what the date of the delivery of that bid bond was?

A. Well, all I can tell you is that it was quite obviously a short time prior to May the 18th.

Q. I see.

A. Whether it was a day or two or three I can't tell you.

Mr. Simon: I offer in evidence Defendant's Exhibit A-3.

Mr. LeGros: No objection.

The Court: Admitted.

(Defendant's Exhibit No. A-3 for identification was admitted in evidence.)

Q. (By Mr. Simon): So that Plaintiff's Exhibit 1——

Mr. Simon: Could that be handed to the witness?

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Simon): ——was signed by Martin Anderson sometime prior to the 18th of May, 1955?

A. If this were the actual signing of the bid bond, yes, sir. I personally have not knowledge whether it was the signing of the bid bond or the

(Testimony of Nelson Friday.)

completion bond. That is something that I suppose only the jury can determine. [180]

Mr. Simon: I offer, if I have not offered in evidence, I do now offer in evidence Defendant's Exhibit A-2.

Mr. LeGros: No objection.

The Court: Admitted.

(Defendant's Exhibit No. A-2 for identification was admitted in evidence.)

Mr. Simon: No further questions, your Honor.

Redirect Examination

Q. (By Mr. LeGros): Mr. Friday, referring to Defendant's Exhibit A-1, which is the letter of September 14th—

A. The letter of December 14th?

Q. September 14th.

A. September 14th, correct, sir, yes.

Q. Does that have reference to any other document?

A. It refers to this particular bond that is under discussion, if that's what you have in mind.

Q. Does it refer to any statement?

A. It refers to our statement of September the 1st, 1955, correct, sir.

Q. And are you familiar with the statement of September 1, 1955? A. I am, sir. [181]

Q. And does that show a one-quarter application of the bond premium to Ancel Earp?

A. That shows the one-quarter that was to be credited to Oklahoma City, that is correct, sir.

(Testimony of Nelson Friday.)

Q. Now, Mr. Friday, does any agent writing for United States Fidelity & Guaranty Company through McCollister & Company have any authority to contract for any rate other than the rate which shows on the ratings on file and in effect at the time a bond is written?

Mr. Simon: Objected to as irrelevant and immaterial, if the Court please.

The Court: That objection is overruled.

A. We very definitely do not, sir.

Q. (By Mr. LeGros): Must all employees of the United States Fidelity & Guaranty Company adhere to the ratings on file?

Mr. Simon: The same objection.

The Court: Overruled.

A. Yes, sir. Under Insurance Department regulation we would have no alternative other than to do it without violating the law, and it's not our intention to violate the law.

Q. (By Mr. LeGros): Are there any penalties prescribed for violation of the law?

A. Very severe penalties. [182]

Mr. Simon: I object to that.

The Witness: I'm sorry.

The Court: The objection is overruled.

Mr. LeGros: I have no further questions.

The Court: Is there anything else of this witness? I understand there is none. You may step down.

(Witness excused.)

The Court: You may call the next witness.

Mr. LeGros: I at this time have a deposition which I would like to publish.

The Court: All depositions have been published. If they have not been, they are now.

Mr. LeGros: It is the deposition of William V. Montin, one of the joint venturers, and I would like to call him as an adverse witness. Do you wish me to take the stand, your Honor, and read the responses?

The Court: I wish whoever will read the answers to take the stand, and either Mr. Simon or Mr. Palmer, whichever one wishes to do so, will read the questions beginning at Page 3 with the words "Direct Examination by Mr. Oliver".

Mr. LeGros: If the Court please, if I may preface that with a statement, this is an examination on behalf of the plaintiff. [183]

The Court: But as I understand it he was then called and you now call him——

Mr. LeGros: As an adverse witness.

The Court: As an adverse witness?

Mr. LeGros: Yes, your Honor.

Mr. Simon: Well, if the Court please, I think that the stipulation indicates—the stipulation on Page 2 of the deposition indicates the character of this interrogation on the taking of the deposition, and I find nothing in it to indicate that there was any stipulation that it was taken as an adverse witness.

The Court: What portion of the rule gives the right to take a deposition of a witness as an adverse witness?

Mr. LeGros: That is not specifically set forth in the rule, your Honor, simply a statement that depositions may be offered in evidence if the witness is not available, and I'm simply stating the same limitation that would be made on him if he were here present in court.

The Court: I will have to see some authority before ruling in your favor on that.

Mr. LeGros: Yes, your Honor.

The Court: I understood there was objection.

Mr. Simon: Yes, your Honor. [184]

The Court: To his using this deposition testimony as that of or with like effect as if he had called him as an adverse witness.

Mr. Simon: That's right.

The Court: And without being bound thereby.

Mr. Simon: That's right.

The Court: The objection to his doing so is sustained. What is your pleasure with respect to further use of this deposition or non-use of it?

Mr. LeGros: If I cannot call him as an adverse deponent I will withdraw the deposition.

Mr. Simon: I have no objection to that.

The Court: The matter respecting this deposition proposed by plaintiff is discontinued and withdrawn.

Mr. LeGros: If the Court please, plaintiff will now rest its case in chief.

The Court: The defendant may now proceed with defendant's case in chief.

Mr. Simon: Call Mr. Oja.

The Court: He has already been sworn. He will

now resume the stand for further interrogation on behalf of the defendant. [185]

VERN J. OJA

recalled as a witness by defendant, being previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Simon): Mr. Oja, you have heretofore been sworn, I think. A. Yes, sir.

Q. And you were interrogated to some extent as an adverse witness by Mr. LeGros yesterday?

A. Yes, sir.

Q. Mr. Oja, I'll ask that you be handed Plaintiff's Exhibit 1.

(The exhibit was handed to the witness.)

Q. That, Mr. Oja, as I understand it, is the application which was obtained by the McCollister Company for the execution of bonds, a bid bond in the first instance and payment and performance bonds, and was procured by Mr. Beeson. I'll ask you whether on the second page—Page 3 actually of that form of application your name appears?

A. It does.

Q. And in what capacity did you sign that?

A. As secretary of Islands Construction Company.

Q. I'll ask you, Mr. Oja, whether at the time you signed that form of application the typewritten figures 47,000 [186] and so forth at the top of that sheet had been inserted in that blank?

A. It was not.

(Testimony of Vern J. Oja.)

Q. Mr. Oja, I'll ask you whether you had anything to do with the negotiations leading to the execution of these bonds? Were you present when the conversations were had between Mr. Beeson on the one hand and Mr. Anderson and Mr. Baldwin on the other? A. I was not.

Q. Mr. Oja, were you present in Mr. Baldwin's office when Mr. Nelson Friday was in the office of Islands Construction Company discussing the settlement of this—I mean adjustment of this dispute between you as to the proper amount of premium?

A. I was.

Q. I'll ask you whether at that time in Mr. Baldwin's office and in the presence of Mr. Baldwin Mr. Friday did not say in substance and effect—

Mr. LeGros: I'll object, if the Court please.

The Court: May I have the question read.

(The reporter read the last partial question.)

Q. (By Mr. Simon): —that—

Mr. LeGros: Ask him what was said.

The Court: The objection is sustained. You [187] are at liberty to ask the witness what this person said.

Mr. Simon: I thought I had laid the foundation for an impeaching question, but I'm perfectly willing to put it the other way.

Q. (By Mr. Simon): Were you present when the discussion took place between Mr. Nelson Friday and Mr. Loren Baldwin with reference to an adjustment of this matter of the dispute?

A. I was.

(Testimony of Vern J. Oja.)

Q. Will you tell us according to your best recollection when that was?

A. I believe it was sometime in December of '55.

Q. And what in substance and effect did Mr. Nelson Friday say?

A. Well, in substance he stated that he could not make any settlement or an adjustment of this particular premium and primarily because U. S. F. & G. had reinsurers in connection with this particular premium and they couldn't get an adjustment possibly from the reinsurers and that was where the difficulty was.

Q. Was anything said by him as to whether it would have been possible for him to have adjusted this matter were it not for the presence of reinsurers?

A. I'm sure it was. It was stated that U. S. F. & G., if [188] they were the primary insurer on the bond they could make their—make an adjustment.

Q. Did he indicate how that could be done?

The Court: Answer yes or no.

A. No.

Mr. Simon: I think that's all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. LeGros): Mr. Oja, referring now to Plaintiff's Exhibit 1, when that document was presented to you was any of the typewritten material inserted in that document?

A. I believe the only typewritten material—the

(Testimony of Vern J. Oja.)

only typewritten material was "Anderson Construction Company, Islands Construction Company, Montin-Benson Company", referring to our signatures.

Q. Referring to the first page, was any of that material contained thereon?

A. The typing at the very top of the page indicating the full name of the applicant.

Q. And was this document delivered to you at your office?

A. It was delivered to us by Jack Beeson at our office.

Q. And had anyone else signed it prior to your signature?

A. I don't remember whether it was signed by anyone prior [189] to my signature or not. I can't tell you that.

Q. And did you ask Mr. Beeson about the rate of premium on a bond for six plus million dollars?

A. I did not at that time.

Q. You had no concern whatsoever about the amount?

A. Certainly I had a concern in the amount.

Q. But you were executing a blank document on negotiations that you knew nothing about?

A. It was common procedure to execute blank documents with Jack Beeson.

Q. Yes. You have complete confidence in Mr. Beeson, do you not? A. Yes, sir.

Mr. LeGros: Now, this cross examination, I

(Testimony of Vern J. Oja.)

don't know if I can conclude it or not. It might be rather lengthy.

The Court: How long do you expect it to take, have you any idea?

Mr. LeGros: Oh, five or ten minutes. I have some records that I asked him to bring here that I would like to identify.

The Court: I wish you to proceed then.

Q. (By Mr. LeGros): Mr. Oja, in response to a subpoena duces tecum served upon you did you bring with you certain documents? [190]

A. Yes.

Q. Pertaining to the bid computations by the joint venture leading toward the bidding on this project?

A. Yes. I believe our Counsel has it in his file.

Q. Can he produce them at this time?

A. Yes, he can.

(Documents were handed to Mr. LeGros.)

The Court: Does Counsel for the defendant now produce the documents requested in the subpoena duces tecum?

Mr. Simon: They were so identified to me, your Honor.

Mr. LeGros: They may be marked as one exhibit.

The Clerk: It will be marked Plaintiff's Exhibit No. 14.

(Records of Islands Construction Co. were marked Plaintiff's Exhibit No. 14 for identification.)

(Testimony of Vern J. Oja.)

Q. (By Mr. LeGros): Mr. Oja, you have before you the figures used by the joint venture giving your bid on the Ladd-Elmendorf project, do you not? A. Yes, I do.

Q. And those are records of your office?

A. They are.

Mr. LeGros: I'll ask that Plaintiff's Exhibit [191] 14 be admitted.

The Court: Any objection?

Mr. Simon: I object to it as irrelevant and immaterial.

The Court: Overruled. Plaintiff's Exhibit 14 is now admitted.

(Plaintiff's Exhibit No. 14 for identification was admitted in evidence.)

Q. (By Mr. LeGros): How many various schedules were there to the project on which you were bidding?

A. Individual items, there were hundreds.

Q. I'm speaking now of schedules.

(Witness computing.)

Q. It went from A through H, did it not?

A. Yes.

Q. And H was subdivided into——

A. There were nine schedules.

Q. Yes, and could you refer to your Schedule A and to your work sheet there? A. Yes.

Q. Do you have your schedule set up so that you can tell as to the allocation in that schedule for a bond or bond premiums?

A. I cannot, as a percentage was used.

(Testimony of Vern J. Oja.)

Q. And what percentage was allocated to that?

A. Well, it was various in various items. There are one, two, three, four, five schedules under this schedule, five unit items, and they varied from a ten per cent overhead item to a three per cent overhead item.

Q. In other words, in your schedules your bond premiums are carried in your overhead item?

A. They are carried as an overhead item.

Q. And what other than bond premium does that include?

A. Supervision, trucking, equipment, gas, oil, taxes, insurance of various types, 150 items if you wish me to enumerate them all individually.

Q. And does the same pertain to each of the following schedules, in general?

A. In general that's true.

Q. Now referring to Schedule H, why on that one do you have an item entitled Bond and Profit, \$80,000?

A. Schedule H was calculated and estimated in a different office by different employees. They were under Mr. Anderson's supervision in his office in the Central Building, and his methods were entirely different than the methods we used. We consolidated the figures and arrived at a total figure in our office.

Q. Well, then would it be true to state, Mr. Oja, that in your office you computed Schedules A through G and Mr. Anderson in his office computed Schedule H? [193]

A. That's right.

(Testimony of Vern J. Oja.)

Q. And you don't know how it was that he set up an item of Bond and Profit, \$80,000?

A. No, I don't know how he arrived at that particular figure.

The Court: The Court will have to interrupt the proceedings here today. I have some other matters to consider.

The jury, subject to the Court's previous admonitions and subject to what I suggested to you yesterday about being prepared to remain together at a late hour or even overnight applies to your jury service tomorrow. Please bear it in mind and so advise your family members. You will now retire subject to the Court's previous admonitions. The jury will now retire until tomorrow morning at ten o'clock. Be here at ten o'clock tomorrow morning instead of 9:30.

(Thereupon, at 4:40 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Thursday, May 16, 1957.) [194]

Thursday, May 16, 1957, 10:00 o'clock a.m.

(All parties present as before.)

The Court: Bring in the jury.

Mr. LeGros: I was going to ask your Honor for the record, I understood in chambers that the legal question as to the——

The Court: What we said in chambers had nothing to do with the record in this case and will not be made a part of the record in this case. We were discussing informally the instructions to be given

by the Court. Nothing said by you or Mr. Simon or Mr. Palmer or the Court in chambers is a part of the record.

(The following proceedings were had within the presence of the jury.)

The Court: Let the record show that each and all the jurors are present and also that all parties on trial with their Counsel. You may proceed.

Mr. Simon: Mr. Oja was on the stand.

The Court: Mr. Oja will resume the stand for further interrogation.

VERN J. OJA

resumed the stand.

Cross Examination—(Continued)

Q. (By Mr. LeGros): Mr. Oja, I believe at the conclusion of yesterday's [195] session I was interrogating you as to Schedules H-1 and H-2 which you had advised me were prepared in Mr. Anderson's office.

A. Yes, sir.

Q. And I take it they were then used together with your own work in preparing your final bid?

A. Yes, that's right.

Q. Now referring to your Schedules A, B, C, D, E, F and G, I note that you have the work set up so that you have a series of columns across the page.

A. Yes.

Q. And you have a code at the top indicating what each column represents. I wonder if you could tell me what the abbreviations or the letters at the top of each column indicate.

(Testimony of Vern J. Oja.)

A. Well, in the very first—this is a unit price contract based on unit prices for dirt and for fill and for the construction of various parts.

Q. Yes.

A. So that the very first column represents the government pay quantities. In other words, the amount of quantities you should figure on. In other words, in one case excavation for building, 50 cubic yards. The next column represents material. These happen to be figures of our estimator in our office. And "L" stands for [196] labor, "S" subcontract, freight, overhead, profit, unit price bid, then you calculate that times the total quantities and get your total price for the particular job.

Q. Well, now you have left some of them out. What is "ER"?

A. I'll have to talk to Mr. Bailey. He has his own code and I'm not certain whether that means——

Q. I think you previously stated that your bond computation or your bond allowance was figured in overhead. A. In overhead, that's right.

Q. And Mr. Anderson in his work sheets figures bond and profit? A. Separately, yes.

Q. Now, can you look at those work sheets and tell me what amount you have allotted to bond in each of your schedules? A. I cannot.

Q. Can you look at that and tell me what you've allotted to profit? A. Yes.

Q. And is that on a percentage basis or on a dollar basis?

(Testimony of Vern J. Oja.)

A. It's on a dollar basis in lots of cases. In some cases it's percentage. It varies as you go through the whole job.

Q. And percentagewise what does it average out to? [197]

A. I would imagine it would come pretty close to five or six per cent.

Q. I see on some of these it's seven and a half per cent.

A. On some bids we don't put any profit on them, I mean on account of the fact that they would be practically all subcontract and there would be no profit on it because they would be performing the work.

Q. I see on "A", for instance, you have a profit of \$10,545 and that figures seven and a half per cent.

A. Yes. That just happens to be that way, but you have to take into account individual items in calculating that thing.

Q. In that schedule overhead, including all your items, is figured at 7.2 per cent?

A. 7.2 per cent. That includes——

Q. Roughly your profit and your overhead come out the same? A. And the bond.

Q. The overhead, according to your statement, would include the bond? A. Yes.

Q. Now, Schedule B, your overhead is \$16,506 and your profit is \$19,032?

A. That's right, yes.

Q. Now, Schedule C, your overhead including

(Testimony of Vern J. Oja.)

all the items you mentioned is \$107,782 and your profit is figured at [198] \$119,833?

A. That's right. That was a larger building.

Q. And on Schedule D, the overhead including all the items composing that is \$7,832 and a profit of \$8,460? A. Yes.

Q. And on Schedule E, overhead of \$105,721, a profit of \$116,289? A. That's right.

Q. And on Schedule F, overhead at \$3,161 and profit at \$3,321? A. That's right.

Q. And on "G", overhead at \$5,525 and profit of \$3,156? A. That's right.

Q. Do you know what the percentage of your overhead on these schedules the bond was allotted for? A. No, I don't.

Q. So in looking at these work sheets of yours there is no way you can determine by figure or percentage the amount that was allotted to bond?

A. That's right.

Mr. LeGros: No further questions.

The Court: You may ask any questions on re-direct which you feel are necessary. [199]

Redirect Examination

Q. (By Mr. Simon): Mr. Oja, when the checks which were tendered to McCollister & Company and to Ancel Earp & Company were returned by those people, did those returned checks and the letters returning them come to your attention? Was that part of your duty? A. Yes, they did.

(Testimony of Vern J. Oja.)

Mr. Simon: I would like to have those marked, please.

The Court: That will be done.

The Clerk: It will be Defendant's Exhibit A-4. Do you want them together, Mr. Simon?

Mr. Simon: Yes, put them together.

(Two letters were marked Defendant's Exhibit No. A-4 for identification.)

Mr. LeGros: If the Court please, is Mr. Simon reopening his direct so that I may have an opportunity to cross examine on this?

The Court: Are you reopening or seeking to reopen?

Mr. Simon: Yes. I suppose this isn't—

The Court: Do you ask leave to do that?

Mr. Simon: Yes, your Honor.

The Court: Have you any objection? [200]

Mr. LeGros: No objection.

The Court: You may reopen, and the right of cross examination is always fully preserved.

Mr. LeGros: I have no objections to the letters being admitted, to save the time of qualifying them.

Q. (By Mr. Simon): Mr. Oja, those letters comprising Defendant's Exhibit A-4 are two letters, one from McCollister & Company signed by Mr. Friday? A. That's right.

Q. And what is the date of that?

A. January 25th, 1956.

Q. And the one from Ancel Earp?

A. January 20, 1956.

(Testimony of Vern J. Oja.)

Q. Those letters returned to you the checks therein described? A. Yes.

Q. Were those checks that were thus returned checks drawn on banks in which you had sufficient money to pay them if they had been presented?

A. Yes, sir.

Mr. LeGros: If the Court please, that has been stipulated to and admitted yesterday, I believe.

The Court: Is there any reason why that should not dispose of it? [201]

Mr. LeGros: I stipulate they made a valid and continuing tender.

Mr. Simon: I offer in evidence Defendant's Exhibit A-4.

Mr. LeGros: No objection.

The Court: Admitted.

(Defendant's Exhibit No. A-4 for identification was admitted in evidence.)

The Court: What kind of papers do you call them, Mr. Oja? Give a name that reflects the kind of information in them.

A. Well, they are letters of transmittal on the refusal of the checks in full payment of the bond, letters of transmittal from the various bonding companies on the final payment checks.

The Court: Do Counsel agree on a name that could be applied to them that would be a quick way of referring to them in case somebody loses track of them?

Mr. Simon: I should say that they might be described as letters rejecting tender.

(Testimony of Vern J. Oja.)

The Court: You may proceed.

Mr. Simon: I think that's the extent of my additional examination.

The Court: You may cross examine.

Mr. LeGros: I don't care to cross examine. [202]

Mr. Simon: All right, Mr. Oja, you may be excused.

The Court: The witness is excused from the stand.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Simon: Call Mr. Baldwin at this time.

The Court: Come forward. You have already been sworn as a witness, Mr. Baldwin. Come forward and take the witness stand as a witness for the defendant.

LOREN ELLSWORTH BALDWIN

recalled as a witness by defendant, being previously duly sworn, was examined and testified further as follows:

The Court: State your name again for the record.

A. Loren Ellsworth Baldwin.

The Court: Ellsworth?

A. Yes, sir.

The Court: You may inquire.

Direct Examination

Q. (By Mr. Simon): You have heretofore identified yourself, Mr. Baldwin, [203] as the president

(Testimony of Loren Ellsworth Baldwin.)
of Islands Construction Company which is one of the joint venturers mentioned in this arrangement?

A. That's right.

Q. And under the terms of the joint venture agreement the administration of the affairs of the day-to-day conduct of this activity was by Paragraph II of that agreement entrusted to Islands?

A. That's right.

Q. Islands having a 50 per cent share of the venture? A. That's right.

Q. But the matter of insurance and bonds was left by express provision of that agreement to you and to Mr. Anderson? A. That's right.

Q. I'll ask you whether you know Mr. J. C. Beeson, John C. Beeson, who was on the stand here yesterday? A. Yes, I do.

Q. How long have you known him?

A. About twenty years.

Q. Have you had occasion during that time to do business with him with reference to the obtaining of bonds? A. Yes.

Q. What kind of bonds?

A. All types of bonds. [204]

Q. To what extent did you do business with him over that period?

A. Well, he wrote practically exclusively all of our bonding requirements for the construction business.

Q. From what period on?

A. Oh, from 1941 until the present day.

Q. During that entire time did Mr. Beeson ever

(Testimony of Loren Ellsworth Baldwin.)

tell you that the Insurance Commissioner of the State of Washington had anything to do with the rates that he quoted you? A. Never.

Q. Were you ever informed from any other source? A. No, sir.

Q. Until this lawsuit commenced were you ever told by anybody? A. No, sir.

Q. Now will you tell us in your own words about the discussion which you and Mr. Anderson had with Mr. Beeson prior to the signing of the bid bond application which is Plaintiff's Exhibit 1 in this case?

A. Well, under a new arrangement I had started shipping our cargo to Alaska by barge and it entailed a heavy risk, and insurance for barge transportation is very difficult to obtain unless good insurance people are fully informed of the cargo and who is going to haul it, [205] so I discussed the matter with Martin Anderson and Martin said, "Well, I've been wanting to get these rates out of the way so that we can put them on our estimate sheets for figuring this job, and we'll call up Mr. Beeson and have him come down to our office." Beeson's office is in the same building as Mr. Anderson's.

Beeson came down to the office and we discussed the insurance rates, and then we asked Mr. Beeson, "What about the bond?" We stated we had been quoted a rate from a California bonding company and we were thinking about doing business with them. Mr. Beeson stated that if we would leave

(Testimony of Loren Ellsworth Baldwin.)

the bond to his discretion, that he was sure that the bond would be taken care of as cheaply with his company as any other company. We asked him if that would be with a non-board company or a board company and he said, "Well, the board companies are going to compete with the non-board companies." He said, "I have advance information, and you can rest assured that you will be given the advantage of any reduced rate."

Mr. Anderson and I were both satisfied, having used Mr. Beeson practically exclusively for our business, and we told him to proceed to arrange the bid bond for our bidding the project.

Q. Now, was there any discussion at that time as to the difference in the rate then being charged as between the [206] U. S. F. & G. on the one hand and the non-board companies on the other?

A. Yes, there was.

Q. What was that discussion?

A. Well, Mr. Beeson had been writing bid bonds with non-board companies for me on other projects that I had been constructing. I called this to his attention, this being a large job, and told him that we were bearing down, and asked him about the rate, and he assured me that the rate would be comparable to a non-board company's rate.

Mr. LeGros: Pardon me, Mr. Baldwin. May I ask you to speak up a little? It's pretty hard to hear you.

The Court: Mr. LeGros, if there is some part of

(Testimony of Loren Ellsworth Baldwin.)

it you wish to have repeated I will have all or part of it read back by the reporter.

Mr. LeGros: If I could have the last answer read. I missed parts of it.

The Court: Very well. That will be done.

(The reporter read the last answer.)

Mr. LeGros: Thank you.

Q. (By Mr. Simon): Did he tell you what the differential was at that time between the non-board rate and the board rate? [207]

A. No, he didn't. I knew pretty well what it was, having just used a non-board rate on a previous job.

Q. And what was your information at that time as to the differential between a non-board rate and a board rate approximately?

A. Well, we spoke of percentage figures.

Q. About—— A. Yes, 25 per cent.

Q. The non-board company rate was approximately 25 per cent less than the board rate at that time? A. That's right.

Q. Now, in the course of this discussion did Mr. Beeson say to you that the U. S. F. & G. rate——

Mr. LeGros: If the Court please, I'll object to that as leading.

The Court: The objection is sustained. You may ask him what he said, if anything.

Mr. Simon: I want to call his attention specifically to a statement made by Mr. Beeson in order that he may acquiesce or contradict it. I'll put it this way if you like.

(Testimony of Loren Ellsworth Baldwin.)

Q. (By Mr. Simon): Mr. Beeson said yesterday, as I understand it, in substance and effect that he told you that the board companies' reduction would be such that the rate established would be competitive, equal or less [208] than the non-board companies', and that you would be entitled to and he would see to it that you got the benefit of this reduction, he said provided that the reduction was made before your bonds were delivered.

Mr. LeGros: I'll object to that.

The Court: Just a minute. Do you wish to put that in the form of a question?

Mr. Simon: I'll say——

The Court: By asking him, "Did he say that?"

Mr. Simon: Yes.

Q. (By Mr. Simon:) Did Mr. Beeson say to you that or anything comparable to that with reference to the limitation therein stated as to whether you would be entitled to or when you would be entitled to or the condition upon which you would be entitled to the reduction?

Mr. LeGros: I'll object to that question, if the Court please. It is stating all kinds of suppositions to the witness and I don't think he has stated the substance of Mr.——

The Court: My understanding is that Counsel has tried to state the pertinent subject matter of the other witness' statement as a condition of the interrogating part submitted to this witness in the matter. Do you have an objection as it not being——

(Testimony of Loren Ellsworth Baldwin.)

Mr. LeGros: My objection is as to the [209] insertion in the question as to the time of delivery of the bond. I believe Mr. Beeson's testimony was at the time of the effect of the bond, when the bond took effect.

Mr. Simon: Well, I will have no objection to amending the question in that respect.

The Court: Does the witness understand the amendment?

A. Not entirely.

The Court: I just——

Mr. Simon: All right.

Q. (By Mr. Simon): Did Mr. Beeson say that this reduction to which you would be entitled if you signed up for a U. S. F. & G. bond was conditioned upon the reduction being made or announced before the effective date of the bond which was delivered?

A. No, sir.

Mr. LeGros: If the Court please, I object to that, too, the insertion in there as to the reduction being conditioned upon the time of announcement.

The Court: He has a right to ask this witness if Mr. Beeson said any such thing, Mr. LeGros, in the Court's opinion, and the objection is overruled. You may cross examine him as to whether or not Mr. Beeson did say any such thing to him then or yesterday while [210] on the stand.

Q. (By Mr. Simon): Was any such limitation mentioned by Mr. Beeson at all in connection with this discussion?

A. There was no qualification at all, sir.

(Testimony of Loren Ellsworth Baldwin.)

Q. If there had been would you have signed for a U. S. F. & G. bond?

A. No, I would have insisted that my company not sign.

Q. Now, when you——

The Witness: Your Honor, may I make a comment?

The Court: Just a moment. The witness seems to wish to make an explanation of his answer. Is that what you had in mind?

Q. (By Mr. Simon): Had you finished your answer, Mr. Baldwin?

A. Well, I just didn't want everyone here to think that I didn't know how to conduct my business. Naturally I wouldn't have signed for a \$10.00 bond if I could buy a \$7.50 one.

Q. That would do the job?

A. That would do the same job, that's right.

Q. Now, I think when you were on the stand the other day Counsel asked you about these checks which went to McCollister & Company in payment on account. Did you have any conversation with Mr. Beeson at the time that these payments were made as to what the proper rate for this bond was?

A. When the payment was made——

Q. Yes, at or about the time of the payments.

A. Well, we discussed the payments with Mr. Beeson several times in the presence of Mr. Anderson, Mr. Oja, and—I believe that's all, but at various times, and Mr. Beeson said they were working on an adjustment.

(Testimony of Loren Ellsworth Baldwin.)

Q. And did you rely on his assertion that they would effect or that they were working on an adjustment when you made these payments on account?

A. I felt sure, I'm sure they were, sir.

Q. Had you ever had any prior experience on a rate adjustment with McCollister & Company?

A. I can't answer that without our records. We've had discussions on several rates and whatever the difficulty has been it's always been taken care of if there was one.

Q. Well, did McCollister & Company ever take the position that they wouldn't adjust——

Mr. LeGros: If the Court please, I think that's a leading question.

The Court: That objection is sustained.

Q. (By Mr. Simon): Well, in the course of any of these other dealings that you have had with McCollister & Company where there was a discussion about the premium rates, I'll ask you whether McCollister & Company ever refused to discuss an adjustment on the ground that you [212] hadn't protested within any given time? A. No, sir.

The Court: State, if you recall, how many years you have been doing business of this nature with McCollister & Company as insurance agents.

A. Oh, sixteen years. Since 1941. I believe they wrote the first completion and performance bond for our firm in 1941. It could have been prior to that, but I recollect 1941.

(Testimony of Loren Ellsworth Baldwin.)

The Court: You may inquire.

Q. (By Mr. Simon): Now, did you have a conversation with Mr. Nelson Friday about an adjustment of this matter? A. Yes, I did.

The Court: What was the answer?

A. Yes.

Q. (By Mr. Simon): And about when was that?

A. I think it was early December, 1955.

Q. And where? A. In our office on 36th.

Q. And who was present?

A. Mr. Oja, Mr. Friday, Mr. Brenner part of the time, and myself.

Q. What did Mr. Friday say, if anything, at that time about this adjustment of the rate which was the subject of discussion? [213]

A. Well, Mr. Friday said that inquiry had been made from the home office and they would not make an adjustment, and I asked Mr. Friday if he would submit to me what the bond would have cost if it was written in a board company or a non-board company and he said that he would be glad to do that, that he would get the figures for me.

Q. Did Mr. Friday say to you anything at that time as to why his company would not make an adjustment?

A. He said he was very sorry that they didn't make an adjustment, that they valued our business.

The Court: No, Mr. Baldwin, that is not responsive. Read the question. Answer yes or no to the question.

The Witness: The answer is yes.

(Testimony of Loren Ellsworth Baldwin.)

The Court: Wait just a minute. Read the question.

(The reporter read the last question.)

A. Yes.

Q. (By Mr. Simon): What did he say about that?

A. He said that the U. S. F. & G. had reinsured, sold the bond to other insurance companies, and that it was practically impossible to make an adjustment with all these different companies. That's the way I recollect it. [214]

Q. Did he say anything, if you recall, as to what would have been the case if it had not been for this reinsurance? A. Well, yes.

Q. What did he say about that?

A. He inferred that——

Q. No, what did he say, what was the substance of what he said, to the best of your recollection?

A. Well, that an adjustment could be made between the two companies.

Q. Do you mean by that that he could have made an adjustment but for this assignment?

Mr. LeGros: I object to that.

The Court: The objection is sustained. You may ask the witness what he meant by that or something to that effect.

Q. (By Mr. Simon): What did you understand Mr. Friday to mean by what he said?

A. Well, that we would pay the rate that Mr. Beeson had previously given to us for the bond.

Q. But for what, if anything?

(Testimony of Loren Ellsworth Baldwin.)

A. I didn't get the——

Q. Your answer to my mind isn't quite complete.

Mr. LeGros: Well, if the Court please, I'll object to that. [215]

The Court: That objection is sustained. You can ask him another question.

Mr. Simon: All right, I'll try.

Q. (By Mr. Simon): What did Mr. Friday say about why this adjustment to the rate Mr. Beeson had quoted, why his company wouldn't consent to that adjustment?

Mr. LeGros: If the Court please, that's repetitious of what was gone into just a minute ago.

The Court: The objection is overruled.

A. Well, he said that the U. S. F. & G. had sold an interest in the bonds to other companies, or I believe they call it the——

Mr. LeGros: I'll renew the objection.

The Court: The objection is sustained. The answer is stricken to the last question. You may inquire with a proper question if he gives proper answers.

Mr. Simon: I think that's all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. LeGros): Mr. Baldwin, you have stated that objections were made to Mr. Beeson by you as to the statements of account as submitted?

A. I can't hear you. [216]

The Court: Would you like the question read?

Mr. LeGros: Yes.

(Testimony of Loren Ellsworth Baldwin.)

The Court: Will you please read it, Mr. Reporter.

(The reporter read the last question as follows: "Q. Mr. Baldwin, you have stated that objections were made to Mr. Beeson by you as to the statements of account as submitted?")

Q. (By Mr. LeBros): Is that true?

A. Yes, that's true.

Q. And when was that done?

A. Oh, at various times. I couldn't name them.

Q. When did you begin to make these objections to Mr. Beeson?

A. I don't believe until after we had made payment of the first part of the——

Q. Pardon me, I still can't hear you. That corner of the——

A. It might be.

Q. ——of the bench there is between us. Would you repeat that, please?

A. I think it was after we made the first payment to the McCollister Company that we discussed this. [217]

Q. That was in September, then?

A. It was when the first invoice was paid, I believe, yes.

Q. That was on approximately September 14th or 15th, somewhere in that neighborhood?

A. That's right.

Q. And it was after you had the telephone call with Mr. Anderson?

A. Yes.

Q. And you didn't communicate any objection to Mr. Beeson prior to that time?

(Testimony of Loren Ellsworth Baldwin.)

A. No, there was no occasion.

Q. Did you actually communicate to Mr. Beeson or to anybody in McCollister that attitude, or was that left to somebody else? Did you do it personally?

A. Well, I did it personally to Mr. Beeson.

Q. Do you recall your deposition being taken on April 23rd, 1957? A. Yes, I do.

Q. And I asked you that precise question. The question, reading from Page 8 of your deposition—going back a little further, on Line 7:

“Q. And when did that attitude develop in your organization?

“A. I would say in September or October.

“Q. It wasn’t until that date, however, that [218] you had determined upon that course of action?

“A. No, we had determined we would pay for the bond. I think the first notification we got we determined we would pay a reasonable percentage of the premium.”

A. That’s right.

Q. (Reading) “Q. And did you communicate to Mr. Beeson or anybody in the U. S. F. & G. organization or McCollister & Company that attitude?

“A. No, I didn’t. It was left entirely to Mr. Anderson.”

Now are you changing that testimony?

A. Yes, I would say I’m changing that testimony, because digging into this thing since talking to you

(Testimony of Loren Ellsworth Baldwin.)

has developed several references to conversations that I've had with Mr. Beeson and Mr. Friday.

Q. You were under oath on April 23rd, 1957?

A. That's right.

Q. Now, Mr. Baldwin, you have stated that you had this conversation with Mr. Anderson at which time you were concerned with insurance rates, premiums, bonds, and that sort of thing in connection with this Ladd-Elmendorf job. When did that conversation take place?

A. Well, Martin Anderson and myself had many conversations. [219] I can't tell you exactly the date of every conversation we had.

Q. Well, when did the conversation between yourself and Mr. Anderson and Mr. Beeson take place? A. I do not know.

Q. Was it in May of 1955? A. Yes, sir.

Q. About what time in May?

A. I would judge the middle of May, thereabouts.

Q. The middle of May? A. Yes.

Q. Sometime after the 15th of May or——

A. I don't know.

Q. Pardon me? A. I don't know.

Q. Sometime about the middle of May, however?

A. I—you're talking about before the bid?

Q. Yes, I'm talking about the conversation with Mr. Beeson. A. It was in May.

Q. And at that time did you bring up the question of bond or bond premium? A. Oh, yes.

Q. And Mr. Beeson had previously written a

(Testimony of Loren Ellsworth Baldwin.)

number of bonds for you? A. Yes. [220]

Q. And you have stated that you are a practical business man that's not going to pay ten dollars for something you can get for seven and a half?

A. That's right.

Q. So you were concerned with the rate of bond? A. That's right.

Q. And you knew from your past experience that there were two rates, the so-called board rate and the non-board rate? A. That's right.

Q. And you knew there was a substantial difference between the two rates?

A. That's right.

Q. And Mr. Beeson quoted to you a board rate, did he not? A. That's right.

Q. Now, you have stated that you were considering a non-board company. What company was that?

A. The United Pacific and the General and the one in California which had already quoted us. I believe Mr. Oja could tell you that. I don't have the name on the tip of my tongue.

Q. Which one in California?

A. I don't—

The Court: Just a minute. Will you read the witness' answer so Counsel can hear what the [221] witness said, the last statement he made about the California company.

(The reporter read part of the answer as follows: "A. * * * and the one in California which had already quoted us. I believe Mr.

(Testimony of Loren Ellsworth Baldwin.)

Oja could tell you that. I don't have the name on the tip of my tongue.'')

Q. (By Mr. LeGros): Mr. Baldwin, had you previously done any work in Alaska with General Insurance Company as the bonding agent?

A. I'm not sure.

Q. Actually they weren't writing bonds in Alaska at that time, were they?

A. I'm not sure of that.

Q. Had you previously done business with United Pacific Insurance Company?

A. I believe we had, yes.

Q. They are a non-board company?

A. Yes.

Q. And would in all probability that have been the non-board company you would have used?

A. I feel sure it would have been, yes.

Q. That was the only non-board company with [222] which you had established a line of credit, was it not, or a—

A. No, the one in Chicago we had a large line of credit with.

Q. And Mr. Friday had previously arranged bonds for you in United Pacific, had he not, Mr. Baldwin? A. Yes.

Q. And he was at that time an agent for United Pacific as well as U. S. F. & G., was he not?

A. That's right.

Q. Now, Mr. Baldwin, did one of your companies, L. E. Baldwin, Inc., in 1953 write a bond

(Testimony of Loren Ellsworth Baldwin.)
in the amount of \$5,844,000 in the United States
Fidelity & Guaranty Company?

A. I don't know.

Q. Pardon me? A. I don't know.

Q. L. E. Baldwin, Inc., is one of your companies, is it not?

A. Yes, but I can't answer the question.

Q. And you would have signed any bond application in that case, would you not?

A. Yes, I would.

Q. I'll ask you if it's not a fact that on the eight family quarters job at Elmendorf in 1953 you did not write through United States Fidelity & Guaranty Company a bond in that amount?

A. I don't know. [223]

Q. And U. S. F. & G. at that time was a board company and was charging the same rates as were quoted to you by Mr. Beeson, is that not true?

A. I don't know.

Q. Now, Mr. Baldwin, when an invitation for bids was submitted by the government, as required by the Code of Federal Regulations included with the invitation is a Schedule G, I believe it is, which provides for bond requirements; isn't that a fact?

A. I can't answer that question.

Q. And isn't it a fact that bonds filed on government jobs have to be in a form and with a surety approved by the United States Government?

A. I don't believe that true, sir.

Q. Aren't you aware of the provisions of the federal statute?

(Testimony of Loren Ellsworth Baldwin.)

A. Well, I've put up certified checks, sir.

Q. That's character bonds. I'm speaking now of surety bonds.

A. Well, you said it had to be surety bonds. That's not true.

Q. Does the surety bond——

The Court: Just a minute. Did you hear his answer? Read the last answer made by the witness.

(The reporter read the last answer.)

Q. (By Mr. LeGros): I will restrict the [224] answer to surety bonds, and you say that that's not true? A. No, it's not.

Q. That the bonds posted by surety companies with the United States Government do not have to be of such company as is approved by the United States Government?

A. Well, that's not my understanding. You can put up property bonds or cash bonds.

Q. I'm restricting this now to surety bonds. Do you know?

Mr. Simon: Do you mean by "surety bonds" bonds with a compensated surety company as surety?

Mr. LeGros: A surety company, yes.

A. There's no requirement.

Q. (By Mr. LeGros): Pardon me?

A. There's no requirement to my knowledge. You can put up three or four different types of bonds.

Q. Yes, but if you put up a surety bond through

(Testimony of Loren Ellsworth Baldwin.)

a recognized surety company, does that company have to be approved by the government?

A. I don't know.

Q. Now, isn't it a fact, Mr. Beeson,—

A. Baldwin.

Q. Mr. Baldwin, pardon me, that in 1955 the General Insurance Company was not writing bonds in Alaska of the type that you desired?

Mr. Simon: Objected to as repetitive. [225]

The Court: That objection is overruled.

A. I don't know.

Q. (By Mr. LeGros): And isn't it a fact, Mr. Baldwin, that the bonding limit of the United Pacific Company to write bonds in Alaska in May and June of 1955 was limited to the sum of \$644,000?

The Witness: May I comment, your Honor?

The Court: I think you should answer yes or no as to whether you knew that.

Q. (By Mr. LeGros): Isn't that correct?

A. I don't know. I assume that it's correct.

The Court: The question was whether or not you knew.

A. No, I don't know.

Q. (By Mr. LeGros): Pardon me?

A. No, I did not know that.

Q. You didn't know that?

A. No, I did not know that.

Q. Now, your previous answer was that you assumed that was correct.

A. Well, if you'll let me comment on it I can explain.

(Testimony of Loren Ellsworth Baldwin.)

Q. Certainly, you may if you wish.

A. United Pacific is no different than the board companies. They can co-insure. They sell their insurance and that's the limit for the one company. [226] The U. S. F. & G. may have a limit on it, but when they go out on the market they can build this up to maybe \$640,000 per company. In five companies it's three million dollars, ten companies six million dollars. U. S. F. & G. on the bond that was just written they stated used seven or eight or nine companies, and the same thing applies to United Pacific, I assume, just reading between the lines. That is their limit.

Q. Now, Mr. Baldwin, isn't it a fact that if you got a United Pacific bond you would have to get at least enough companies with enough authorized resources approved by the government on the primary obligation of the bond to equal the amount of the bond?

A. The same as U. S. F. & G., yes, sir.

Q. Well, isn't it a fact, Mr. Baldwin, that at the same time United States Fidelity & Guaranty Company was authorized by the government to execute bonds up to the amount of \$10,828,000?

A. I don't know.

Q. By itself? A. I don't know.

Q. Now, Mr. Baldwin, any bond that you got through the United Pacific Insurance Company in the past was gotten in connection or in conjunction with several companies together. [227]

The Court: Put it in a question, "Is that true?"

(Testimony of Loren Ellsworth Baldwin.)

or——

Q. (By Mr. LeGros): Is that not the fact?

A. I can't answer. I don't know.

Q. And that each company executed a separate bond for the respective amount of their obligation and filed that bond with the government?

A. I can't answer that. I don't know.

Q. And isn't it a fact, Mr. Baldwin, that in writing the bond on this occasion you were forced to use a board company, United States Fidelity & Guaranty Company, for the reason that that was the only company that had the resources?

A. No, sir, never, never. That's silly. No.

Q. Pardon me?

A. I say no. I say that's silly. No.

Q. So you were willing to write a bond with a company having a 25 per cent higher rate?

A. No, never.

Q. Relying upon an alleged agreement with Mr. Beeson that at some later date there may be a reduction in rates in an indeterminate amount?

A. No. No, that's not true.

Q. And you state that you are not familiar with the requirement that bonding companies must be [228] approved by the government? A. No.

The Court: By what?

Mr. LeGros: By the government, bonds filed with the government.

A. No, I'm not.

Q. (By Mr. LeGros): Mr. Baldwin, isn't it a fact that in August of 1951 through your corpora-

(Testimony of Loren Ellsworth Baldwin.)

tion L. E. Baldwin, Inc., through Mr. Beeson you wrote a bond in the amount of \$3,481,400 for the two airmen barracks at Elmendorf?

A. I really can't tell you. I would like to comment on that with your permission, sir.

The Court: If it is needed, Mr. Baldwin, to make your answer full, true and correct, you may do that.

A. Well, unfortunately my business is contracting. I have hired a certified public accountant, Mr.——

The Court: I do not feel that is necessary or even responsive. If there is some reason that makes more full and understandable your answer, very well, but what you are saying does not seem to the Court to be reasonably responsive.

A. Well, I do not purchase the bonds or that's not in my part of the business.

Q. (By Mr. LeGros): In other words, Mr. Baldwin, you don't have anything to do with the bonds?

A. Only the—— [229]

Mr. Simon: I object to that as——

Mr. LeGros): I think it's a proper question.

The Court: The objection is overruled. Read the question, Mr. Reporter.

(The reporter read the question as follows:

“Q. In other words, Mr. Baldwin, you don't have anything to do with the bonds?”)

A. The setting up of the general business and the payment of them, yes, but the over-all subscription to our requirements I do not handle.

(Testimony of Loren Ellsworth Baldwin.)

Q. (By Mr. LeGros): But you just happened in this particular instance to participate in the bond negotiations?

A. In all bond negotiations, after they are selected I sit down and discuss them, yes.

Q. After they are selected?

A. After, and with all the parties involved, yes.

Q. Yes. Well, I'll ask you in that case I last referred to in August of 1951 isn't it a fact that there were eight companies there involved on the primary obligation of the bond? I'm not speaking of reinsurance now, I'm speaking of primary obligation on the bond.

A. I couldn't tell you, sir. [230]

Q. And that one of the companies, one of the eight companies primarily on the bond was United Pacific?

A. I don't know.

The Court: At this point we will take the mid-morning recess and the jury will retire to the jury room. Court will be at recess for about ten minutes.

(Short recess.)

The Court: All are present as before the recess. You may proceed.

Q. (By Mr. LeGros): Mr. Baldwin, referring to Plaintiff's Exhibit 14, which are the schedule of estimates used by yourself, by your corporation and Mr. Anderson, is there anything in that which would enable you to tell us what percentage or what amount was estimated as the figure to be allotted for the bond? Do you have the exhibit?

A. No, I don't.

(Testimony of Loren Ellsworth Baldwin.)

The Clerk: Which number, please?

Mr. LeGros: 14. It's the Manila folder and the binder.

(The exhibit was handed to the witness.)

A. No, there is not any definite figure set up for the bond.

Mr. LeGros: I have no further questions. [231]

Redirect Examination

Q. (By Mr. Simon): Mr. Baldwin, I'll ask you in connection with the question that Counsel asked you about whether any non-board companies would have been acceptable in this situation whether in this discussion that you've related with Mr. Beeson Mr. Beeson made any statement on that point to you and Mr. Anderson? A. Yes, he did.

Q. What did he say?

A. He said we could purchase a non-board policy or a board policy, bond.

Q. On the basis of your prior experience with Mr. Beeson tell us whether or not you relied on him as to the selection of—I mean all of the details with reference to the preparation of a suitable bond acceptable to the government. A. Yes.

Q. Now, you said in answer to a question put to you by Mr. LeGros that ordinarily in the matter of the obtaining of bonds where your company alone was involved you didn't attend to that personally, but Mr. LeGros asked you whether it just happened that in this case you had charge of bonds. I'll ask you to refer to what has been marked for

(Testimony of Loren Ellsworth Baldwin.)
identification as Plaintiff's Exhibit 9 here. [232]
Do you recognize that? A. Yes, sir.

Q. That is the joint venture agreement under which the three companies cooperated. The three companies, Montin-Benson, Anderson Construction Company and your company, Islands Construction Company, cooperated in the performance of the work undertaken under this government contract DA-826, did they not? A. Yes, sir.

Q. I'll ask you whether or not on Page 3 of that specific contract in this case immediately above Paragraph IV, whether you will read, please, to the jury the paragraph immediately above the paragraph numbered IV?

A. (Reading) "Management"—

Mr. LeGros: If the Court please, I will offer this Exhibit 9 into evidence.

Mr. Simon: I have no objection to its reception, except I should like, if the Court please, the privilege of substituting a conformed copy for it. This is the original.

Mr. LeGros: I was going to suggest that.

The Court: As I understand, this is their only original.

Mr. Simon: Yes.

The Court: That is the so-called joint venture agreement. [233]

Mr. LeGros: Yes, your Honor.

Mr. Simon: Yes, your Honor.

The Court: It is now admitted.

(Testimony of Loren Ellsworth Baldwin.)

(Plaintiff's Exhibit No. 9 for identification was admitted in evidence.)

The Court: And I ask you to state in the record what the date of it is.

Mr. LeGros: June 14th.

The Court: Is it June 3rd or June 14th?

Mr. Simon: June 14th, your Honor.

The Court: Will Counsel say in answer to the Court's question what thing is dated June 3rd, 1955?

Mr. Simon: That is Plaintiff's Exhibit 1, which has been identified as——

The Court: The bid application?

Mr. Simon: The bid application, your Honor, bears date as of June 3rd.

Mr. LeGros: It has been identified I believe as an application form. I don't think it's been—I think that's a matter——

The Court: Is it the bid bond application?

Mr. Simon: Well, it's a bond application.

Mr. LeGros: Bond application.

The Court: Is that something different, then, [234] from the bid bond application?

Mr. LeGros: There's a question as to whether this constitutes the bid bond application or the payment and performance bond application.

The Court: Is there anything marked for identification in this case which may properly and should be distinguished from this one by being called a bid bond application?

Mr. LeGros: No, your Honor.

(Testimony of Loren Ellsworth Baldwin.)

The Court: Then the same thing that heretofore has been denominated by the Court as the bid bond application was when it was marked, namely marked Plaintiff's Exhibit 1, what you are now referring to, is it, as the bond application?

Mr. LeGros: Bond application.

The Court: Pardon?

Mr. LeGros: Bond application.

The Court: Do both sides prefer the name of Exhibit 1 as bond application?

Mr. Simon: Well, I think it's a fair statement, your Honor. We contend that it was both a bid bond application and a performance and payment bond application.

The Court: Is the bond application just now stipulated as such what is now marked Plaintiff's [235] Exhibit 1 according to Counsel's understanding?

Mr. Simon: Yes, your Honor.

The Court: And it has the date of what?

Mr. Simon: It is dated as of June 3rd, 1955.

The Court: May I ask Counsel if that Plaintiff's Exhibit 1 is the written agreement referred to on Page 4, Line 29, of the pretrial order?

Mr. Simon: Yes, your Honor.

Mr. LeGros: Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Simon): Mr. Baldwin, calling your attention to Plaintiff's Exhibit 9, particularly to Page 3, I should like to ask that you read for the benefit of the jury the paragraph immediately pre-

(Testimony of Loren Ellsworth Baldwin.)

ceding the Roman numeral IV in the center of the page.

A. (Reading) "Management hereunder shall be"——

Q. Will you please keep your voice up, Mr. Baldwin.

A. (Reading) "Management hereunder shall be vested in Martin Anderson and L. E. Baldwin, jointly, and each of the parties hereto agrees to execute a general power of attorney, granting unto them full authority to act for the parties in all matters arising hereunder. Said power of attorney shall further contain a provision authorizing [236] substitution by Mr. Anderson and Mr. Baldwin of another or others to act in their respective places."

Q. Now I'll ask you whether the substance of that agreement had been orally understood between the three companies that signed it prior to the execution of this formal document? A. Yes.

Q. I'll ask you whether the reason that you were concerned with this matter of procuring insurance and bonds in this case for this joint venture arose from that understanding between you, Anderson and Montin-Benson? A. Yes.

Q. That you've just read? A. Yes.

Mr. Simon: That's all.

The Court: Anything else?

Mr. LeGros: Nothing further.

The Court: The witness is excused.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Simon: Call Mr. Anderson.

The Court: Come forward, Mr. Anderson, and resume the stand as a witness on behalf of defendant. You have already been sworn. [237]

MARTIN ANDERSON

recalled as a witness by defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Simon): You have heretofore been identified, Mr. Anderson, as the president of the Anderson Construction Company? A. Yes.

Q. And how long have you done business as the Anderson Construction Company?

A. I think it was 1948.

Q. That's a corporation organized and existing under and by virtue of the laws of the State of Washington? A. Yes.

Q. You're the sole substantial stockholder of it, are you not? A. Yes.

Q. Now, you were present, were you not, at the time of this discussion with Mr. Beeson about the bid bond and performance and payment bonds in connection with the Government Engineers' Contract No. DA-826 on which you, that is your company, Montin-Benson Corporation and Islands Construction Company were jointly going to bid?

A. Yes, I was.

Q. Now tell us approximately when to the best [238] of your recollection this conference took place?

(Testimony of Martin Anderson.)

A. I would say it was in early May.

Q. And who was present?

A. Mr. Beeson, Mr. Baldwin and myself.

Q. Now, with reference to the discussion of the selection of the surety company to execute the bid bond and the performance and payment bonds, did Mr. Beeson have with him upon that occasion any rate schedules? A. I don't think he did.

Q. By the way, how long had you done business with McCollister & Company?

A. The first time in 1937.

Q. And to what extent had you done business with McCollister & Company between 1937 and 1955?

A. Well, up until 1941 I was the superintendent and project manager in the employ of another contractor and had placed business with Beeson for my employer at that time. In 1941—from 1941 on I did business, a substantial amount of business with Jack Beeson on my own behalf, on behalf of the Construction Company.

Q. Now, did you deal with anybody other than Mr. Beeson in your connections with McCollister & Company during that period?

A. Yes. In the beginning in 1941 and '2 I used to deal with Mr. Beeson and also his employers at [239] the time, Mr. John and Dan McCollister.

Q. They both died? A. Yes.

Q. And from that time on you dealt exclusively with Mr. Beeson in connection with McCollister & Company? A. Yes, substantially .

(Testimony of Martin Anderson.)

Q. And what did you understand to be Mr. Beeson's connection with McCollister & Company?

A. I was not cognizant of what his official title was with McCollister Company. He always signed or put under his name on instruments "Attorney in Fact".

Q. Those were on instruments of U. S. F. & G.?

A. Yes.

Q. When you had problems in connection with bonds or bond applications who was the man with whom in McCollister & Company you understood you were to take them up? A. Jack Beeson.

Q. Did Mr. Beeson ever tell you in the course of your dealings with him that the Insurance Commission of the State of Washington had anything to do with the rates that you were required to pay for bonds?

A. No, he did not. I was not aware of that until this became an issue.

Q. And by that do you mean after this case was brought, this action was brought? [240]

A. That's right.

Q. Now will you tell us what your regular procedure was with reference to the obtaining of bonds? I mean by that what would be the first bond that a contractor like you and your associates would be required to obtain, seeking to get a government contract such as this?

A. It would be a bid bond. That has to be submitted with your bid to make the bid valid.

Q. And then do I understand it that if you're

(Testimony of Martin Anderson.)

unsuccessful in the—your bid isn't accepted, you pay a premium to the bond company?

Mr. LeGros: If the Court please, I would not object to the question being asked, but——

Mr. Simon: Well, there's no dispute about this, is there? I mean I was trying to shorten it a little.

The Court: What is the objection?

Mr. LeGros: He's leading.

The Court: The objection is sustained.

Mr. Simon: All right.

Q. (By Mr. Simon): Mr. Anderson, will you please tell us what has been the custom in your dealings with McCollister & Company where they have supplied a bid bond and you were unsuccessful in the bidding as to whether there was [241] any premium collected from you for the execution of the bid bond? A. Yes, there was.

Q. Now, if you were a successful bidder, then in addition to it or supplanting the bid bond at the time you submitted the final contract certain other bonds were required to be furnished; is that not right? A. Yes.

Q. And what are those bonds?

A. A performance bond and payment bond. In some cases only a performance bond.

Q. In this case there was a requirement for both performance and payment bonds?

A. Yes.

Q. If the bid bond was executed by a surety represented by McCollister & Company and you were later awarded the contract and McCollister &

(Testimony of Martin Anderson.)

Company executed as surety the performance and payment bonds, was there any separate premium charged to you on account of the bid bond?

A. No.

Q. I'll ask you whether customarily, or whether in this case Plaintiff's Exhibit 1 was signed by you as an application for the bid bond?

Mr. Simon: Will you hand him Plaintiff's Exhibit 1, please? [242]

The Court: Let him see it, please.

(Plaintiff's Exhibit No. 1 was handed to the witness.)

A. I don't remember the question.

Q. (By Mr. Simon): I asked you whether you signed Plaintiff's Exhibit 1 as an application for the bid bond. A. Yes.

Q. And I'll ask you, did you at any time ever sign any other or different application for the performance or payment bonds in this case?

A. I'm sure we did not.

Q. When this type of application being first signed as an application for a bid bond and the contractor who signed it became the successful bidder, I'll ask you whether it was or was not customary for the employees of McCollister & Company to add the necessary data after its delivery to them to make it an application also for performance and payment bonds?

Mr. LeGros: If the Court please, I object again. That's leading.

The Court: It is leading and the objection is

(Testimony of Martin Anderson.)

sustained. If you have something to show him, it is appropriate to ask him about it or otherwise proceed without leading.

Q. (By Mr. Simon): Now, coming back to this [243] conversation, this conference between you and Mr. Baldwin and Mr. Beeson early in May, where was that held? A. In my office.

Q. And will you tell the members of the jury what was said with reference to the selection of a surety for the bid bond and the performance and payment bonds and the rates, if anything, between you and Mr. Beeson and Mr. Baldwin at that time?

A. We discussed rates on marine insurance, workmen's compensation insurance, and also bonds. I mentioned to Mr. Beeson that this was a large contract and we were interested in getting the most competitive bid we could present, and that the difference between the rates of a board company and a non-board company amounted to a substantial amount of money and that in some cases the difference between the two rates could be enough to swing the bid of a competitive bidder so he could be low if he had a better bond rate, and I said, "What about using a non-board company on this to get the lower rate?" His answer was that, "It's only a matter of a short time until the board companies' rates will be as low or lower than the non-board company rates," and he says, "You're dealing with U. S. F. & G., the largest bonding company in the country, and you're better off to do business with them." [244]

(Testimony of Martin Anderson.)

The Court: Is that all he said that you can think of about the bond premium, the amount of it? If it is not, will you please state what else he said about that subject.

A. He mentioned the fact that it was desirable to do business with a board company because——

The Court: That is not the Court's question. The Court's question relates specifically to the amount of that premium and nothing else, so do not say anything else about any other subject in answer to the Court's question.

A. Well, the amount was the difference——

The Court: It is a question of what he said so far as the Court's question is concerned.

Q. (By Mr. Simon): Your best recollection, Mr. Anderson.

A. I can't recall it, because it was a long conversation and I cannot recollect just what was said in addition.

Q. Well, do you recall whether anything was said about the amount of the contemplated reduction and, if so, what?

Mr. LeGros: If the Court please, I'll object to that as leading.

The Court: The objection is overruled. It appears to the Court that the witness has indicated he has exhausted his own recollection without further interrogation. The objection is overruled. [245]

The Witness: Will you read the question, please?

The Court: Read it.

(The reporter read the last question as fol-

(Testimony of Martin Anderson.)

lows: “Q. Well, do you recall whether anything was said about the amount of the contemplated reduction and, if so, what?”)

A. He said the contemplated reduction would make the board companies competitive or lower, as low or lower than the non-board companies. I remember those words very well, “low or lower”, “as low or lower”.

Q. (By Mr. Simon): State what if anything Mr. Beeson said about it being a condition of getting those lower rates——

Mr. LeGros: I’ll object to that, if the Court please.

Mr. Simon: Well, will you allow me to finish my question?

The Court: The objection is overruled at this stage.

Q. (By Mr. Simon): Will you please, Mr. Anderson, tell us whether Mr. Beeson during the course of that conversation said anything as to whether the reduction in rates to become available to you was dependent upon the reduction [246] being made effective prior to the effective date of the bonds that you were seeking?

Mr. LeGros: I object to that as leading.

The Court: Overruled.

A. He certainly did not. He was very emphatic about the reduction.

The Court: That is sufficient.

Q. (By Mr. Simon): If Mr. Beeson had told you that this reduction of rates in order to be of

(Testimony of Martin Anderson.)

any benefit to you would have to take place before the effective date of these bonds, would you have signed this application for bonds with U. S. F. & G.?

A. No, we would not have, if we could get one with a different company at lower rates, and that's what we were after.

Q. Did Mr. Beeson say anything to you as to whether he could obtain for you acceptable bonds from non-board companies at the lower rates?

A. I am quite sure he did, because he had furnished bonds in other companies——

Q. A little louder, please.

A. I'm quite sure he did. He had provided bonds of non-board companies for us before that.

Q. Now, did you have a discussion with Mr. Baldwin at the time of the payment of the first [247] installment of the—the first payment on account of the bond premium in this case, a telephone conversation I believe it was?

A. I don't remember if it was Mr. Baldwin or Mr. Oja. It was one of them.

Q. What was the occasion for that conversation?

A. As I recollect he had an invoice from McCollister Company.

Mr. LeGros: Would you speak up, please, Mr. Anderson?

The Court: I think you would appreciate that as well as anybody else in the courtroom since you have been sitting there at Counsel table. It is nec-

(Testimony of Martin Anderson.)

essary for you to keep your voice raised to a pitch that is comparable to my voice at this moment. I keep my voice raised, not because I like to hear it, but because it is necessary in this room. Raise your voice so all can hear without the necessity of interrupting you. It is always troubling. It is troubling not only to the witness, it is more so to Counsel and others. Proceed.

A. As I recollect the discussion it was regarding an invoice from McCollister Company and the matter of payment, and they wanted my opinion on it, as I recall it.

Q. (By Mr. Simon): And what was said?

A. As I recall it I recommended that we make a payment on account, which is normal with us, on an invoice for bond premiums. [248]

Q. At that time had you had any discussion with Mr. Beeson about the—I mean after the receipt of the invoice or any invoice for these bond premiums had you had any discussion with Mr. Beeson about the amount shown on the invoice statement?

A. Do you mean before we got the statement or the invoice?

Q. No. In the first place, did you ever yourself or Anderson Construction Company receive any invoice from the United States Fidelity & Guaranty Company on account of these bonds?

A. Not to my recollection.

Q. The only invoices so far as you know are the ones that you learned were sent by McCollister &

(Testimony of Martin Anderson.)

Company to Islands Construction Company addressed to their office? A. Yes.

Q. And sometime in September you had a talk with——

The Court: Mr. Simon, that is leading. I think you can avoid leading this witness.

Mr. Simon: All right.

The Court: At least he could be expected to proceed without leading.

Mr. Simon: All right.

Q. (By Mr. Simon): Prior to this time of your conversation with Mr. Oja or Mr. Baldwin about the payment of the first installment on this [249] invoice had you had any discussion with Mr. Beeson about the amount of the bond premium that was shown on that invoice?

A. We probably discussed it at one phase. I was not too concerned about that in our discussion because I thought that if there was any misunderstanding it would be adjusted.

Q. Well, do you recall when you first had any discussion with Mr. Beeson about the amount?

A. I think that I had one prior to the receipt of this invoice. I know I had one after.

Q. And what was said at that time? In the first place, do you recall where this discussion took place? A. It was in my office.

Q. And what was said in this discussion between you and Mr. Beeson?

A. When I learned that we were being billed

(Testimony of Martin Anderson.)

at the standard board rate I was very indignant, and——

Q. Well, what did you say to Mr. Beeson?

A. I told him that it wasn't right, it wasn't in accordance with our agreement.

Q. And what did he say?

A. He said he thought that could be adjusted, and would be adjusted.

Q. Do you recall when that was approximately?

A. It would be a guess if I mentioned a date, [250] but approximately in September, perhaps, and I might have had a discussion on it earlier. I'm not real sure.

The Court: What year were you speaking of in your last answer?

A. 1955, your Honor.

Q. (By Mr. Simon): How many discussions did you have with Mr. Beeson about this matter?

A. I'd say three or four, maybe five.

Q. What was their tenor in effect?

A. I beg your pardon?

Q. I say in general what was said by you and by him on those occasions?

A. We both felt very bad about it.

Q. Well, what was said, Mr. Anderson?

A. I said to Jack, "Are we going to be able to settle this matter in accordance with our agreement?" and he said, "I think it can be done."

Q. Now, when did you first learn as to the exact amount of the reduction which U. S. F. & G. had put into effect?

(Testimony of Martin Anderson.)

A. I think it was in July or August, late July or perhaps in August.

The Court: In this case I say to the jurors I cannot guarantee this case is going to the jury today. I thought it would. I thought some days it would certainly have gone yesterday. I thought [251] again this morning it would go today, but Counsel and I have a lot of work to do that has not been done yet in the absence of the jury. I cannot tell the jury how long that will take. We have to take the time necessary to complete the work, whether it is a half hour or an hour or two hours or three or four, and so the best that I can say, and I wish I could make the results more accommodating to the jury, is that the jury is excused until 2:30. I ask you to return here at that time. The Court and Counsel will endeavor to finish their work by that time, which must be done in the absence of the jury, respecting the instructions in this case, instructions to the jury, but as to how long it will take I cannot tell you. I believe there is a chance that we may get it finished by that time.

The jury will now retire during the noon hour subject to the Court's previous admonition. You may now retire.

(The following proceedings were had without the presence of the jury:)

The Court: Would it be convenient to Counsel to resume our work together on the requested instructions at shortly after 1:00?

Mr. LeGros: Yes, your Honor.

The Court: I would like to begin as soon as [252] we can. Let's say 1:15, will you?

Mr. Simon: Very well, your Honor.

The Court: All those connected with this case so far as the trial proceedings in this court are concerned are excused until 2:15. Try to be back at 2:15. We might get this work done before 2:30 and the jurors might be back before 2:30. I ask those connected with the case to try to avoid contacts with the jurors. Will the bailiffs assist in accommodating those connected with the case, parties or parties' representatives or agents and others, so as to make it convenient for the jurors to come in and out. Counsel and the trial judge will resume their work on the instructions in chambers at 1:15.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 2:15 o'clock p.m.) [253]

Thursday, May 16, 1957

3:05 O'Clock P.M.

(All parties present as before.)

(The following proceedings were had within the presence of the jury:)

The Court: All are present as before the recess. You may proceed.

MARTIN ANDERSON

resumed the stand.

Direct Examination—(Continued)

Q. (By Mr. Simon): Mr. Anderson, I believe that immediately before we took the recess at

(Testimony of Martin Anderson.)

lunch time you were testifying about your conversations with Mr. Beeson, your statement to him that the statements received by the joint venture were not in accordance with your agreement with Mr. Beeson. To what agreement did you have reference?

A. The agreement that we would get a rate as low or lower than the non-board companies.

Q. And what did Mr. Beeson say about that?

A. You mean at the time we had the conference with him?

Q. Yes.

A. He said we could rely on a rate as low or lower than the non-board companies and use it in preparation in compiling our bid. [254]

Q. No, I meant at the time of this last conversation that you were testifying to immediately before lunch. What did Mr. Beeson say when you said to him that the statements were not in accordance with this agreement that you had with him?

A. He said he thought they would be adjusted.

Q. How many such conferences did you have with him? A. Two or three.

Q. Did you expect that the statement would be adjusted in accordance with Mr. Beeson's statement to you? A. Yes, I certainly did.

Q. And in the meantime you made a couple of payments on account? A. Right.

Q. Now, these rates that were under discussion

(Testimony of Martin Anderson.)

were based on a minimum period of performance, I mean the rates for bonds, which called——

Mr. LeGros: If the Court please, I'll object to the statement of Counsel.

Mr. Simon: All right.

The Court: Sustained.

Q. (By Mr. Simon): Do you know whether the rates which you discussed with Mr. Beeson had anything to do with the length of the contract, the performance of which was guaranteed? [255]

A. I understood it was two years.

Q. And I'll ask you—in other words, the minimum rate was for a period of two years?

A. I think so.

Q. And I'll ask you what the period of performance was under this government contract DA-826 which is under discussion here?

A. You mean the completion dates?

Q. Yes.

A. They varied on different schedules, and I don't think I can quote the exact dates on each schedule but I think if I recall correctly one or two schedules were supposed to be completed in late 1955, and the other schedules were supposed to be completed various dates in 1956, but I can't tell you the exact date of each schedule but I know that they were all supposed to be completed in not later than the year 1956.

Q. Mr. Anderson, has the United States Fidelity & Guaranty Company ever been called upon to assume any loss to take over the completion of any

(Testimony of Martin Anderson.)

contract on any bond they ever wrote for you or any company that you have operated?

A. No, sir.

Q. Do you know whether the same thing is true with reference to the Islands Construction Company?

A. I'm sure the same thing is true. [256]

Mr. Simon: You may inquire.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. LeGros): Mr. Anderson, when was it that you had this conference with Mr. Beeson during which the rates were discussed?

A. As I recall it was in early May.

Q. Now, Mr. Baldwin thought it might be the middle of May? A. I beg your pardon?

Q. Mr. Baldwin thought it might be mid-May. Would that be accurate?

A. The reason I think it was earlier than that is because the bids were originally scheduled to be opened on the 18th of May and they were postponed for a week.

Q. So you made your efforts to get your bond ready for filing and your bonding arrangements completed by the 18th of May, did you not?

A. I'm quite sure we did. I'm not real positive of it because I don't remember just when that extension notice came in.

Q. Handing you Exhibit A-3, that's the bid

(Testimony of Martin Anderson.)

bond. What is the effective date of that instrument? A. May 18th, 1955.

Q. And would you say that your bonding [257] arrangements were completed before that time, that is, you had a commitment as to bonds?

A. Yes.

Q. So when you had this talk with Mr. Beeson and you knew the original bid date was May 18th there was a certain amount of urgency in the obtaining of your bonds, was there not?

A. Not too much urgency on our bid bond.

Q. I'm talking about obtaining your bonding arrangements for the seven million dollar project.

A. Yes, there was some urgency.

Q. Yes. A. It was important.

Q. It was important and it was essential that you get those bonds in proper shape early, was it not? A. Yes.

Q. Now, Mr. Anderson, was Mr. Beeson apprised of the urgency of the matter?

A. I don't think he had to be apprised because he followed it just as closely or closer than we did.

Q. You mean he was in the bond business and he knew when your bonds had to be filed?

A. Yes.

Q. Now, had you ever previously yourself or in conjunction with others used bonds from United States Fidelity & Guaranty Company? [258]

A. Yes.

Q. Even though they have the so-called board rate as distinguished from the non-board rate?

(Testimony of Martin Anderson.)

A. Yes.

Q. In fact in 1951 you got a nine million dollar bond through them, did you not?

A. Yes.

Q. And you paid the board rate?

A. That I don't know.

Q. From U. S. F. & G., they are a board company, are they not?

A. I guess they are. I understand they are.

Q. And that was a project that you entered into in conjunction with the Montin-Benson Corporation in another joint venture, was it not?

A. Yes.

Q. Now, in your dealings with Montin-Benson, and that has involved several different projects, has it not? A. Yes.

Q. They have requested that their proportion of the bonds be billed through Oklahoma City, Ancel Earp, have they not?

Mr. Simon: Objected to as irrelevant and immaterial unless it be confined to this case. [259]

Mr. LeGros: I think this is a question as to his past dealings with Montin-Benson.

The Court: The objection is overruled.

Q. (By Mr. LeGros): Isn't that true?

A. Will you repeat the question?

Q. That Montin-Benson Corporation asked in your previous dealings involving bonds that their billings be through Oklahoma City?

A. That isn't as I recall it exactly.

Q. Pardon me?

(Testimony of Martin Anderson.)

A. That's not the way I recall it exactly.

Q. How do you recall it?

A. As I recall it they were interested to see that Ancel Earp got a share of the bond premium proceeds.

Q. Yes, they were interested in seeing that Ancel Earp got credit for their share of any joint venture. Is that an accurate statement?

A. There was some question of what was their share.

Q. Yes, but they had—you knew of their arrangement with Ancel Earp?

A. I knew there was an arrangement.

Q. Yes. And isn't it a fact, Mr. Anderson, that that was the very reason, because of their close connection with United States Fidelity & Guaranty Company, that that provision was inserted in your partnership agreement [260] allowing each, or not the partnership but in your joint venture agreement allowing each member of the joint venture to give his proportion of any bond or insurance business to his own designated broker?

A. It's quite common in joint ventures.

Q. Wasn't that the case here? A. Yes.

Q. Pardon me? A. Yes.

Q. And it was understood by the members of the joint venture? A. Yes, I think so.

Q. Now, Mr. Anderson, with this urgency for getting the bonds it was necessary that you get a bond that would be readily approved by the Corps of Engineers, was it not? A. Yes.

(Testimony of Martin Anderson.)

Q. And had you done business through any of the non-board companies that could write a bond of up to seven million dollars and have it approved?

A. I don't think I'm competent to answer that question, because the bonding company, we usually assume that any bonding company that will write a bond are capable of providing a satisfactory bond.

Q. In other words, you would leave it up to the bonding company to provide a bond that would be satisfactory to the Corps of Engineers? [261]

A. We usually left it up to Jack Beeson.

Q. Yes, and it was absolutely essential in this case, was it not, that you have a bond by the 18th of May or bonding arrangements by that time which would be satisfactory?

A. Well, it turned out to be the 25th of May.

Q. Yes, but at the time you had the original conference it was the 18th, was it not?

A. I don't know whether they were completed by the 18th of May or not. We may have gotten the notice whereby the urgency was not stringent by the 18th.

Q. My question is that in your original conference early in May you were shooting for a May 18th deadline, were you not? A. That is right.

Q. So when you write your bonds in a board company at the higher rate, as you did previously, one of the controlling factors was in getting a bond that would be approved by the Corp of Engineers, was it not? A. Well,—

(Testimony of Martin Anderson.)

Q. Pardon me?

A. If it wasn't approved there wouldn't be any use of submitting it.

Q. Yes, and the amount of the bond was a very important factor in that, was it not? [262]

Q. You mean the amount of the bid?

Q. The amount of the bond that you would require.

A. Well, that's spelled out by the government, their requirements.

Q. Right. Now, Mr. Anderson, handing you Exhibit 14, the Manila portion of it, and directing your attention to Schedules H-1 and H-2 and particularly directing your attention there to the item marked Bond and Profit, \$80,000. A. Yes.

Q. Now, does that record which you have before you comprise the record which was made through your office as to your figures in estimating this job?

A. It was prepared toward that end.

Q. In your office? A. Yes.

Q. And can you tell us in further detail as to what portion of the \$80,000 figure was allocated to profit and what portion was allocated to bond?

A. No, I cannot without doing a lot of calculating here trying to ascertain what the total amount of the Schedules H-1 and H-2 were. I don't recall it at the moment.

Q. Actually Schedules H-1 and H-2 are one part of nine separate schedules under this same contract, are they not? [263]

(Testimony of Martin Anderson.)

A. I don't think so. I think Schedules H-1 and H-2 were bid separately, if I recall correctly.

Q. Weren't they part of the total bid that was submitted by the joint venture?

A. They were part of the total bid, yes.

Q. Yes. But each schedule was figured separately, was it not? A. Yes.

Q. And you can't tell us at this time what portion of that figure of \$80,000 was allocated to bond?

A. I can tell you an approximate percentage.

Q. And what is that, please?

A. It would be approximately six and a half to seven dollars per thousand of the amount bid, so far as Schedules H-1 and H-2 are concerned.

Q. And Mr. Anderson, did you prepare any other computation to be used in submitting your bid?

A. Do you mean me personally?

Q. You personally or your office.

A. Yes, our office compiled all these other sheets.

Q. In the same exhibit? A. Yes.

Q. Now, Mr. Anderson, when was it that you made your first objection to Mr. Beeson as to the rates charged on this joint venture? [264]

A. The first objection?

Q. The first objection, yes.

A. Well, as I recall we had a discussion on it.

Q. When was that, please?

A. Oh, I think it was in August or September. I don't recall.

Q. Well, your Counsel in preparing a pretrial

(Testimony of Martin Anderson.)

order contended that, "Defendant sometime in October, 1955, for the first time became aware that the rate at which the statements for premium due were being billed to the joint venture was an improper rate and promptly thereupon made inquiry and protest." Would you say that date is more nearly accurate?

A. Well, I was not concerned about the actual billing because we have gotten many erroneous billings in error inadvertently that have always been adjusted.

Q. My question was, was that time of October, 1955, more accurate than the dates that you have mentioned?

A. It may be more accurate in so far as an actual protest is concerned.

Q. Then when Mr. Baldwin called you in September of 1955 as to the payment which was to be made on that date you were advised at that time as to what you were being billed, were you not?

A. In September? [265]

Q. Yes.

A. Yes, we had a discussion over the telephone on it.

Q. And Mr. Baldwin didn't protest then and you didn't protest even though you knew the amount which you were being billed; isn't that true?

A. Well, it depends on what you call a protest. We discussed the matter with the people we had our arrangement with.

(Testimony of Martin Anderson.)

Q. You discussed it with Mr. Baldwin, didn't you? A. Also with Mr. Beeson.

Q. Well, then which date is correct? That's what I'm trying to get at.

A. Well, it's pretty hard to remember the date. I don't remember what I ate for breakfast that morning.

Mr. LeGros: I have no further questions of this witness.

The Court: You may inquire.

Redirect Examination

Q. (By Mr. Simon): Mr. Anderson, in answer to a question put to you by Mr. LeGros as to the calculation that you employed as to bond premium for inclusion in your figure of bond premium and profit, will you tell me what it was that you said?

A. I said about six-fifty to seven dollars per thousand dollars of the amount of the bid.

Q. In other words, that the premium on the bond would be about seven-tenths of one per cent?

A. Yes, six to seven, .6 to .7 per cent.

Q. And these were estimates that you were making to the best of your ability, is that right?

A. That is right. They were finally revised subsequent to preparation of this estimate.

Q. And how was it revised?

A. Downwards. We reduced it.

Q. By how much?

A. \$100,000 over the total job.

Q. In other words, after you had made this

(Testimony of Martin Anderson.)

compilation you submitted a revised bid of \$100,000 less?

A. Yes, and it was conditioned on receiving an award for the large schedules.

Q. And did that reduction take into account this reduction in the bond rate?

A. The bond premium was a part of that reduction.

Q. When was that final reduced bid submitted, do you recall?

A. Submitted?

Q. Yes.

A. It was submitted with the bid on the 25th of May. [267]

Q. The 25th of May?

A. With our original bid.

Q. I see.

Mr. Simon: No further questions, your Honor.

The Court: Anything else?

Recross Examination

Q. (By Mr. LeGros): Mr. Anderson, you say that reduction was reflected in other documents than what you have before you?

A. The reduction was reflected in a letter that we wrote accompanying our bid. There was no time to make any computation sheet because those things——

Q. Where are your work sheets for that reduction?

A. I beg your pardon?

Q. Where are your work sheets?

A. We didn't have time to make work sheets

(Testimony of Martin Anderson.)

because that happened about two hours before bid opening time. You get lowered prices on certain things.

Q. You mean your estimate was such that you could just in the flash of—the motion of a pen knock off \$100,000?

A. Not quite that fast, no.

Q. You did it pretty fast though, didn't you?

A. Yes. You have to do it fast on any bid opening in the last two or three hours. [268]

Q. So there was some cushion in your bid?

A. Cushion?

Q. Yes. There was room for——

A. No, you get telephone calls at the last minute reducing prices.

Mr. LeGros: I have no further questions.

The Witness: I beg your pardon?

Mr. LeGros: Nothing further.

The Court: Anything further?

Mr. Simon: Nothing further.

The Court: You may step down.

(Witness excused.)

The Court: You may call the defendant's next witness.

Mr. Simon: The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. LeGros: Yes. I will call Mr. Friday back to the stand.

The Court: You may come forward, Mr. Friday, and resume the stand for further interrogation in rebuttal. [269]

NELSON FRIDAY

recalled as a witness by plaintiff, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

Q. (By Mr. LeGros): Mr. Friday, in your capacity as head of McCollister & Company are you familiar with the bonding companies that are qualified to submit bonds acceptable to the Federal Government? A. Yes, sir.

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: Overruled.

A. It is part of our responsibility to see that a bond does meet the Federal Government requirements, otherwise the contractor and everybody else is bound to be—I mean the bid would be rejected.

Q. (By Mr. LeGros): And does the Federal Government publish any list of companies holding certificates of authority from the Secretary of the Treasury under an Act of Congress approved July 30, 1947?

Mr. Simon: Objected to as irrelevant and immaterial.

The Court: Overruled.

A. Yes, they do. They publish such a list annually. [270]

Q. (By Mr. LeGros): Is that list available to all federal bond approving officers and to persons required to give bonds to the United States?

A. Yes, sir.

(Testimony of Nelson Friday.)

Q. And that would include contractors such as the members of this joint venture?

A. Yes, sir.

The Clerk: Plaintiff's Exhibit 15.

(A document entitled Companies Holding Certificates of Authority from the Secretary of the Treasury under the Act of Congress Approved July 30, 1947 (6 U.S.C., Secs. 6-13) as Acceptable Sureties on Federal Bonds (a), was marked Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. LeGros): Handing you what has been marked for identification as Plaintiff's Exhibit 15, could you tell me what that document is, please?

A. It's the list published by the United States Treasury Department and lists the companies holding certificates of authority under the Secretary of Treasury under the Act of Congress approved on July the 30th, 1947.

Q. What is the effective date of that document that you have before you?

A. This one was the list that was published on May 2d, 1955. There's an annual list. They vary [271] very slightly from year to year.

Q. And does each company on that list have to requalify each year?

A. That is correct. They reappraise the value that they might be entitled to as far as bond capacity is concerned.

Q. And does that list include on it the bonding

(Testimony of Nelson Friday.)

capacity of each of the companies listed thereon?

A. That is correct, as far as the bonding capacity that they can accept, the Federal Government will accept on behalf of that individual company.

Q. Now, Mr. Friday, in writing a bond to the government, to whom does the government look for its protection?

A. They look to the bonding company. That is the reason for the bond. In other words, we guarantee to the extent of our bond that the job is performed in accordance with their satisfaction.

Q. Yes. Now, when this bond in this particular case was being contemplated what was the extent of bond that was in the minds of the parties?

Mr. Simon: Objected to as irrelevant and immaterial, not proper rebuttal.

The Court: It is not proper rebuttal. I would like to know what there is about this that calls for this inquiry. [272]

Mr. LeGros: Yes, your Honor. Mr. Baldwin—

The Court: As something inspired exclusively in connection with the defendant's case in chief.

Mr. LeGros: Yes. Mr. Baldwin testified as to his ability to write bonds in non-board companies. This is to show that at the time this came up it was not possible to write in a non-board company. I think it's proper rebuttal of that testimony.

Mr. Simon: If the Court please, the testimony of Mr. Beeson yesterday corroborated by Mr. Baldwin today was that Mr. Beeson said, and they looked to Mr. Beeson for this advice, that they

(Testimony of Nelson Friday.)

could write this bond in the United Pacific Casualty Company, a non-board company, and this, if it were material at all, was a proper part of the plaintiff's case and is not proper at this time by way of rebuttal.

Mr. LeGros: Your Honor, that is not my understanding of Mr. Beeson's testimony. His testimony was that these people requested a board company. He was asked by Mr. Simon as to that and he said, "If they requested it, I gave it to them."

The Court: The objection is sustained on the ground it is not proper rebuttal.

Mr. LeGros: What was the last question to which objection is sustained? [273]

(The reporter read the last question as follows: "Q. Now, when this bond in this particular case was being contemplated what was the extent of bond that was in the minds of the parties?")

Q. (By Mr. LeGros): Mr. Friday, from checking that instrument which you have before you can you determine the bonding capacity of the United Pacific Insurance Company?

Mr. Simon: Objected to as irrelevant, immaterial, not proper rebuttal.

Mr. LeGros: If the Court please, it's a matter I went into with Mr. Baldwin.

The Court: Pardon?

Mr. Simon: Well, it would have been a proper part of his case in chief, if the Court please.

(Testimony of Nelson Friday.)

The Court: It so seems to the Court. The objection is sustained.

Q. (By Mr. LeGros): Now, Mr. Friday, in arranging for a bond in the approximate amount of seven million dollars is it possible to arrange a combination of companies each pooling their resources to gain sufficient bonding strength to have a bond that will be approved by the government and to arrange that in the matter of a few days?

Mr. Simon: The same objection, if the Court please.

The Court: Is it not for the same purpose, to rebut something about this matter introduced by Mr. Beeson you say yesterday and Mr. Baldwin today?

Mr. LeGros: This is the same matter that was taken up by Mr. Baldwin on their case in chief, and I think I'm entitled to rebut it.

The Court: The Court makes the same ruling as it did with respect to the other objection. The objection is sustained.

Mr. LeGros: I will offer Plaintiff's Exhibit 15.

Mr. Simon: The same objection, if the Court please.

The Court: May I see that.

(Plaintiff's Exhibit No. 15 for identification was handed to the Court.)

The Court: Let both Counsel see it again and see if it has any purpose other than this aspect which has been mentioned.

Mr. LeGros: Your Honor, this is something that

(Testimony of Nelson Friday.)

was brought up with Mr. Baldwin, and I think it's admissible in that connection.

The Court: To further clarify and explain [275] his testimony?

Mr. LeGros: To further clarify and explain his testimony, yes, your Honor.

Mr. Simon: I think it's precisely along the line of the prior testimony that the Court has excluded.

The Court: It may be, but I think it has some other value and the Court overrules the objection. Plaintiff's Exhibit 15 is now admitted.

(Plaintiff's Exhibit No. 15 for identification was admitted in evidence.)

Mr. LeGros: I have no further questions.

The Court: Any interrogation, Mr. Simon?

Mr. Simon: Yes, your Honor.

Cross Examination

Q. (By Mr. Simon): Mr. Friday, do I understand you to say that you know that the defendant Anderson Construction Company or any of its officers ever saw Plaintiff's Exhibit 15 or anything like it?

A. I could not say if they saw it, Mr. Simon. I don't know that they did. I personally did not show it to them. It is available, and that's as far as I know.

Q. And generally it would be available in your office?

A. It's available in any bonding office of [276] consequence, and in ours in particular, sir.

(Testimony of Nelson Friday.)

Q. It's one of the things like the Towner rate schedule and the rate schedules of non-board companies that a well-equipped bonding company would have in its files?

A. Yes, sir. Very frequently contractors have them. I don't—they may not have had it themselves, but many of them do have it, sir.

Q. It's one of the tools of the bonding company agent's trade?

A. It's a tool of the bonding company and a tool of the contractor, the same as a Tournapol or a saw or anything else. It's part of the money, it's part of the thing that goes into making money out of the contracting business.

Q. Isn't advice as to what combinations of insurance from bonding companies are possible the sort of thing that a contractor ordinarily consults his bond agent about?

Mr. LeGros: If the Court please, I will object to that as improper cross examination on matters not gone into on the examination on direct.

The Court: Does it relate to this exhibit?

Mr. Simon: Yes.

The Court: The objection is overruled.

The Witness: Just exactly how did the question read? I want to be careful in answering it. [277]

The Court: Read it, Mr. Reporter.

(The reporter read the last question as follows: "Q. Isn't advice as to what combinations of insurance from bonding companies are

(Testimony of Nelson Friday.)

possible the sort of thing that a contractor ordinarily consults his bond agent about?"

A. That's exactly why we have the bond agency.

Q. (By Mr. Simon): And Mr. Beeson had at his disposal such a list? A. That's correct.

Q. And Mr. Beeson would have the information contained in such a list in mind when he discussed this matter with Mr. Anderson and Mr. Baldwin, wouldn't he?

A. Yes, sir, and if they had confidence in Mr. Beeson, why they would have confidence in his ability to select the proper bonding company for them.

Q. Did you hear Mr. Beeson's testimony yesterday that the United Pacific was an acceptable bonding company for the writing of this bond?

A. I do not know whether he made that statement or not. It is possible to accept the United—I was in hopes I would get to explain that, but you have objected, so I can't help you. [278]

Q. Did you say today to Mr. Baldwin in the washroom out——

Mr. LeGros: I'll object to that, if the Court please, as he's going beyond the scope of the direct examination, as to what was said to Mr. Baldwin today.

The Court: For what purpose do you seek to ask him this question?

Mr. Simon: Well, I think if Counsel will wait until I complete the question it will be self-evident.

The Court: You may finish the question, and

(Testimony of Nelson Friday.)

then do not answer until Counsel has an opportunity to object, Mr. Friday.

The Witness: O. K., sir.

Q. (By Mr. Simon): Did you say to Mr. Baldwin in the washroom out there during the morning recess——

Mr. LeGros: I'll object to a conversation in the washroom.

The Court: The objection is overruled so far as this stage of the question is concerned.

Q. (By Mr. Simon): ——that you had erred in your testimony yesterday?

A. Very definitely I did not say that I had, erred in my testimony yesterday.

Q. You did not say to him that you were sorry, [279] that you had been in error in what you said about a conversation with him and with Mr. Oja?

A. If you want me to tell the whole story I would be very happy to do so.

Q. I'm just asking you whether you made either of those assertions.

Mr. LeGros: I think the witness is entitled to answer the question.

The Court: Counsel is entitled to have him answer yes or no to the question, and then if it is necessary in the witness' honest belief for him to explain his answer in order to make the statement full, true and correct, the Court will certainly allow him that privilege at this time.

Q. (By Mr. Simon): Your answer is no?

The Court: I do not think he said no.

(Testimony of Nelson Friday.)

Mr. Simon: Oh, I'm sorry.

The Court: Will you answer yes or no?

The Witness: Tell me what the question is again. Now, it's rather left-handed and I want to understand it correctly.

The Court: Let the question be read.

(The reporter read the question as follows:

"Q. You did not say to him that you were [280] sorry, that you had been in error in what you said about a conversation with him and with Mr. Oja?"')

A. I told Mr. Baldwin I was very sorry if there was some misunderstanding as to what I had said to him between Mr. Baldwin and I, because Mr. Baldwin and I are both honorable gentlemen and I'm quite certain that neither one of us felt that either person was lying and that if there was a misunderstanding it was purely a misunderstanding.

Q. (By Mr. Simon): That was the extent of the conversation, was it?

A. That was the extent of it. I think Mr. Baldwin would be very happy to confirm that right this minute.

Q. Your answer to my question is that you did not say that you were mistaken in what you had said about your conversation with him and Mr. Oja in your testimony yesterday?

A. I was not mistaken.

Q. I say your present testimony is that you did not say that to Mr. Baldwin in the washroom?

A. No, sir.

(Testimony of Nelson Friday.)

Q. All right.

Mr. Simon: That's all.

Mr. LeGros: That's all, Mr. Friday. [281]

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. LeGros: That is the rebuttal of the plaintiff, your Honor.

The Court: Any surrebuttal?

Mr. Simon: Yes. I would like to call Mr. Baldwin.

The Court: You may do that.

LOREN ELLSWORTH BALDWIN

recalled as a witness by defendant, having been previously duly sworn, was examined and testified further in surrebuttal as follows:

Direct Examination

Q. (By Mr. Simon): Mr. Baldwin, I'll ask you whether Mr. Friday at the recess this morning in the washroom in the hall here did not say to you in substance and effect that he was sorry that——

Mr. LeGros: I'll object, if the Court please, to the leading.

The Court: The objection is sustained.

Mr. Simon: Well, all right.

Q. (By Mr. Simon): Mr. Baldwin, will you tell us whether you had a conversation with Mr. Nelson Friday in the washroom [282] this morning at the recess?
A. Yes, I did.

(Testimony of Loren Ellsworth Baldwin.)

Q. About his testimony yesterday?

A. Yes.

Q. What did Mr. Friday say to you about it?

A. Mr. Friday said he was sorry that he had had to testify the way he did, that evidently he had forgotten the conversation he had had with Mr. Oja and myself. It later developed that——

The Court: No, he asked you not what later developed, but what he said.

Q. (By Mr. Simon): Did he say anything further?

A. Yes. I told him I was surprised and he said, "Well, I'm sure that as two business gentlemen that we understand one another," and that's about the size of it.

Mr. Simon: That's all.

Cross Examination

Q. (By Mr. LeGros): Mr. Baldwin, you mean that the effect of it was that there was a difference of opinion between you and Mr. Friday as to the substance of the conversation you had?

A. Oh, yes, definitely.

Q. In other words, there is a difference, there are two views on the conversation? [283]

A. That's right.

Q. That was the sum and substance of it?

A. Well, I would say materially, yes.

Q. Yes.

Mr. LeGros: That's all.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Simon: The defendant rests.

The Court: Does the plaintiff rest?

Mr. LeGros: Yes, your Honor.

The Court: At this time we are going to take a short recess of about ten minutes or a little less, and the jury will now retire to the jury room for the midafternoon recess.

(Short recess.)

The Court: All have returned to their places as before the recess.

Members of the jury, we have reached such stage in this trial that it is now appropriate for the Court and jury to hear the arguments of Counsel in this case on the merits.

The Court will during the Court's instructions later tell you in a more and better connected way that it is necessary for the jury to remember the evidence [284] and the Court's instructions. Also you will be told that if there should be any conflict between your recollection of the evidence and Counsel's contentions about the evidence, what the facts are, what the evidence to establish, what the probative effect is, that means the effect as proof of a fact, in the case, it is for the jury to say what the evidence is. But, Counsel on each side have the right and they also have the duty to make for the benefit of this jury such reasonable comments and arguments upon the effect, what it tends to show and establish in the way of facts which they honestly think the evidence does show, and Counsel on each side also have a right to have the jury give

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Q. (By Mr. Simon): Did he say anything further?

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Q. Yes.

Mr. LeGros: That's all.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

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The Court: Does the plaintiff rest?

Mr. LeGros: Yes, your Honor.

The Court: At this time we are going to take a short recess of about ten minutes or a little less, and the jury will now retire to the jury room for the midafternoon recess.

(Short recess.)

The Court: All have returned to their places as before the recess.

Members of the jury, we have reached such stage in this trial that it is now appropriate for the Court and jury to hear the arguments of Counsel in this case on the merits.

The Court will during the Court's instructions later tell you in a more and better connected way that it is necessary for the jury to remember the evidence [284] and the Court's instructions. Also you will be told that if there should be any conflict between your recollection of the evidence and Counsel's contentions about the evidence, what the facts are, what the evidence to establish, what the probative effect is, that means the effect as proof of a fact, in the case, it is for the jury to say what the evidence is. But, Counsel on each side have the right and they also have the duty to make for the benefit of this jury such reasonable comments and arguments upon the effect, what it tends to show and establish in the way of facts which they honestly think the evidence does show, and Counsel on each side also have a right to have the jury give

fair and considerate attention to these arguments of Counsel and to give fair and reasonable weight to them.

Remember that Counsel's arguments are not facts, they are not evidence, they are merely legitimate, intended to be legitimate comment on the proving effect, what we say in law the probative effect, of the evidence, with the hope that they can assist the jury in arriving at a true and correct verdict in this case.

Plaintiff has the right to make the opening argument and also the last or the closing argument, and in between those two arguments of the plaintiff will come the argument of defendant through its Counsel. [285]

I understand that there will be two defendant's arguments, so this afternoon for some time we will have the first two arguments, the opening argument of the plaintiff and one of the arguments of the defendant, and then we are going to take a recess in this trial until tomorrow morning and we are going to come back here at the earliest hour that is convenient to the jurors, and I will discuss that with the jurors later to hear the remaining arguments, the one argument remaining on defendant's part and the closing argument of the plaintiff, and thereafter the Court will instruct the jury tomorrow morning, and then tomorrow morning submit the case to the jury for its deliberation and verdict.

At this time we will hear plaintiff's opening argument.

(Thereupon, oral argument was presented to the Court and jury by Mr. LeGros in behalf of plaintiff, and Mr. Palmer in behalf of defendant.)

The Court: Tomorrow morning we will hear further argument from Counsel on both sides and then after that the Court will instruct the jury governing the jury's deliberations, and after that then the case will be submitted to the jury for its final deliberation and verdict.

Until then you are subject to the Court's [286] previous admonition. Do not discuss this case with anyone, do not discuss it or permit anyone to discuss it with you, and I wish you to be reminded that you are subject to all the other admonitions, too, about gaining information about it from other sources. Do not discuss it among yourselves, do not gain any information about this case at all.

Tomorrow the case will be submitted to the jury for your determination and verdict, and that will occur before noon. Then thereafter you will deliberate in the case for the length of time that you think you ought to. There is no rule determining the length of time which a jury does or ought to or does not take to deliberate upon its verdict and to arrive at it. That will be in your hands. That will be entirely in your hands, at least so far as all practical limits are concerned.

The jury, subject to the Court's admonition, will now retire to your several homes and/or places of temporary residence, and I ask you before you go, can you be here at nine o'clock tomorrow morning?

Mr. Petersen, is there some trouble in your case? Do you feel it is——

Juror Petersen: No, I think I can make it all right. I'll make arrangements so I can make it.

The Court: Do you think it is a matter of a few minutes one way or the other?

Juror Petersen: I may be a few minutes late but I'll try to be here on time.

The Court: Will it cause you to suffer greater expense than you would ordinarily suffer?

Juror Petersen: No.

The Court: I say to each and all of you that I do not wish you to feel badly if it turns out impossible for you to get here at nine o'clock. I will know if you do not that it is because of something impossible or something so near so it that it did not seem that it could be done. We will wait for you. We hope, however, that you will do everything you reasonably can to be here at nine o'clock tomorrow morning, each and all of you.

Does any other one of you feel any great inconvenience in getting here at nine? Mrs. Dyre, is there any impossibility about it?

Juror Dyre: It isn't impossible, Judge, but I would be so happy if we could have it at 9:30 instead of nine. I would be just so happy with those four boys of mine jumping around and everything.

The Court: Very well, we will make it 9:30 then. [288]

Juror Dyre: Thank you.

The Court: Is there anyone else? Very well, it will be all right, then. 9:30 instead of nine.

Court is adjourned until tomorrow morning at 9:30. You may step down. 9:30.

(The following proceedings were had without the presence of the jury:)

The Court: I have temporarily mislaid, I believe, the extra copy of the pretrial order which I think, I could be wrong about this, Counsel gave me for my own use, office use. By any chance do Counsel have an extra copy of that pretrial order that is legible?

Mr. LeGros: I don't have. I gave your Honor the only other copy that I had.

The Court: I have had one and I have been using one right along, but all of a sudden today it has disappeared. I know no one has thrown it away. Will you kindly——

The Clerk: I'll look downstairs and see if I have one.

The Court: Will you kindly look at your own files and see if you have an extra copy of that pretrial order. It was entered on the 9th, last Thursday. Did you ever see it, Mr. LeGros? I think you prepared it [289] on your stationery.

Mr. LeGros: Yes, your Honor.

The Court: Was there among your copies one that had a red line on the left-hand margin?

Mr. LeGros: No, your Honor. I think all of them had the—it's our instructions that have the red line. We use red line paper for that.

The Court: Very well. All those connected with this case are excused until 9:30 tomorrow morning.

We will hear further argument from Counsel on each side tomorrow morning.

(Thereupon, at 5:00 o'clock p.m., a recess herein was taken until 9:30 o'clock a.m., Friday, May 17, 1957.)

Friday, May 17, 1957, 9:45 o'clock a.m.

(All parties present as before.)

The Court: All are present. The argument of Counsel will now resume and we will hear the concluding argument of defendant's Counsel at this time.

(Thereupon, oral argument was presented to the Court and jury by Mr. Simon in behalf of defendant, and Mr. LeGros in behalf of plaintiff.) [290]

The Court: Members of the jury, you have heard the testimony, have received the evidence and have heard the arguments of Counsel. After the Court instructs you, you will retire to the jury room to consider your verdict.

The facts admitted by both sides in this case are:

I.

The plaintiff, United States Fidelity & Guaranty Company, at all times material was and now is a corporation created and continued as such by and under the laws of the State of Maryland, of which it is a citizen and resident.

II.

The defendant, Anderson Construction Co., Inc., at all times material was and now is a corporation

created and continued as such by and under the laws of the State of Washington, of which it is a citizen and resident with its registered office in the City of Seattle.

III.

The plaintiff at all times material was and now is duly qualified and duly authorized to [291] engage in the business as a surety within the State of Washington, to which has heretofore been paid all prescribed corporate fees.

IV.

This is a civil action in which the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

V.

That defendant signed and delivered to the plaintiff the latter's printed form of application in evidence before you as Plaintiff's Exhibit 1, applying for execution by plaintiff as surety of certain bonds to the United States of America in connection with a certain construction contract known as "DA95-507-Eng-826, Elmendorf and Ladd AFB".

VI.

In connection with said signed printed application the plaintiff executed on behalf of the defendant in favor of the United States of America two bonds; namely, a performance bond, referred to in some places as Government Standard Form 25, in the sum of \$3,085,178.50, and a payment bond, sometimes referred [292] to as Government Standard

Form 25A, in the sum of \$2,500,000, and that on the back of one of said bonds appears a recital that the premium for said bonds was \$47,753.72, and that said bonds together with similar bonds executed by other members of the joint venture of which defendant was a member were delivered by and/or for the defendant and the other members of the joint venture by Islands Construction Co. as manager of said joint venture consisting of defendant corporation and Islands Construction Co. and Montin-Benson Corporation, and were received by and/or for the obligee United States of America on or before the 17th of June, 1955.

VII.

Both said bonds having been accepted, they presently continue to be effective undertakings of the plaintiff as surety thereon.

VIII.

That statements of account in the amount of \$47,753.72 were submitted to Islands Construction Co. as manager of the joint venture on account of the premiums charged under dates of July 1, 1955; August 1, 1955; September 1, 1955; October 1, 1955; November [293] 1, 1955, and December 1, 1955; that the joint venture without protest paid on said account under date of September 1, 1955, the sum of \$11,938.43, and a like sum was similarly paid on account under date of October 21, 1955, which payments were properly credited.

IX.

That notification to defendant and others constituting the joint venture to proceed with performance under their construction contract identified as "DA95-507-Eng-826, Elmendorf and Ladd AFB" was issued by or for the United States of America on the 17th of June, 1955.

X.

That the document now in evidence as Plaintiff's Exhibit 11, being the plaintiff's bond premium rates as filed with the Insurance Commissioner of the State of Washington for effect after the date of April 15, 1951, with respect to the bonds within the classification of the bonds involved in this case, is genuine, and that the amount of bond premium if calculated by using said Exhibit 11 rates for said bonds is \$47,753.72. [294]

XI.

That the document now in evidence as Plaintiff's Exhibit 12, being the plaintiff's bond premium rates as filed with the Insurance Commissioner of the State of Washington on the 5th of July, 1955, for effect after the 20th of July, 1955, in respect to bonds within the classification of the bonds involved in this action, is genuine, and that the amount of bond premiums if calculated by applying said Exhibit 12 rates to said bonds is the sum of \$35,576.79.

XII.

That the defendant on or about January 5, 1956, tendered to the defendant two checks, one being for

\$2,805.73 and one being for \$8,894.20, amounting to \$11,699.93, which said tender was rejected by plaintiff and said checks were returned to defendant; that defendant has kept good its tender by depositing that amount with the Clerk of this Court on the 12th day of July, 1956.

You must accept the foregoing admitted facts as true without question as to their truth.

Respecting matters alleged and contended [295] which are not admitted, each party has the burden of proof as to its respective allegations and contentions.

By the term "burden of proof" is meant the obligation to prove or establish a fact by a preponderance of the evidence.

By the term "preponderance of the evidence" or "fair preponderance of the evidence" is meant that evidence on a particular matter which, when fairly, fully and impartially considered by you, has greater weight with you, produces a stronger impression and is more convincing to you as to its truth than that to which it is opposed, and such preponderance of the evidence is not necessarily determined by the greater number of witnesses who may have testified for the one party or the other regarding such matter, since you may take into consideration all of the evidence in the case no matter by which side produced.

The plaintiff United States Fidelity & Guaranty Company is suing the defendant Anderson Construction Co. to recover the balance alleged to be

due the plaintiff on the premiums for furnishing a performance bond and a payment bond to the United States Government for the defendant. The plaintiff claims that the unpaid balance of this premium is \$23,876.86. The defendant claims that the unpaid [296] balance of this premium is \$11,699.93, which it has tendered to plaintiff and paid into court.

The defendant Anderson Construction Co. is in the construction business. In 1955 it formed a joint venture with two other companies, namely Islands Construction Co. and Montin-Benson Co., to bid upon a contract with the United States for certain construction work upon an Air Force base in Alaska. This bid was accepted by the United States. In order to do the work, however, the members of the joint venture had to furnish the United States with a performance bond guaranteeing payment to the Government if they failed to perform their contract, and also a payment bond guaranteeing their payment of all claims for material and labor in connection with the project.

The plaintiff is a commercial insurance company in the business of furnishing such bonds for a fee. In about May, 1955, when the joint venture was bidding on the Government contract, the defendant applied to the plaintiff for the execution of a performance bond and a payment bond required by the Government. This application was handled for the plaintiff by McCollister & Company, insurance brokers, and by J. C. Beeson, Vice President of McCollister & Company. The McCollister Company

furnished the [297] defendant with plaintiff's printed form of application for such bonds and the defendant through its officers signed the application and delivered it to McCollister & Company for the plaintiff. Thereafter in June, 1955, the plaintiff executed the two bonds through J. C. Beeson as its attorney in fact. The bonds were delivered to the United States of America about June 17, 1955.

These bonds are still in effect. On the back of one of them is a recital that the premium paid for both bonds was \$47,753.72. At the time the defendant applied for the bonds and at the time they were executed by the plaintiff, the plaintiff had on file with the Insurance Commissioner of the State of Washington its schedule of premium rates for such bonds. If calculated according to the rates then on file, the premium on these bonds would be \$47,-753.72.

On July 5, 1955, the plaintiff caused new revised premium rates to be filed with the Insurance Commissioner of the State of Washington which became effective on July 20, 1955. If calculated according to these new revised rates, the premium for the bonds furnished by the plaintiff would be \$35,-576.79.

You are instructed that a joint venture is treated at law as a form of partnership, and that each [298] member of the joint venture is bound by the acts of the other member or members done within the scope of the joint venture.

It is the duty of those dealing with an agent to know of the nature and extent of his authority to

bind his principal. A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume or which he holds the agent out to the public as possessing.

You are instructed that the plaintiff in its business as a surety and in executing said bonds was and is subject to the Insurance Code of the State of Washington as then in force. You are instructed that the Insurance Code of the State of Washington is a public law of said state and among other things provides:

“Premium rates for insurance shall not be excessive, inadequate or unfairly discriminatory.

“Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates [299] and every rating plan as to surety insurance and every rating schedule, minimum rate, class rate and rating rule as to other insurances and every modification of any of the foregoing which it proposes.

“Where a filing is required, no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by another section of the law.

“If so authorized by an insurer, the Commissioner shall accept in lieu of filings by the insurer filings on its behalf made by the rating organization then licensed as provided in this particular article of this statute.

“Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization and shall not deviate therefrom except as provided in this section.

“Any person violating any provision of this article shall be subject to a penalty of not more than \$50.00 for each such violation, but if such violation is found [300] to be wilful, a penalty of not more than \$500.00 for each such violation may be imposed. Such penalties may be in addition to any other penalty provided by law.

“Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker or solicitor shall, as an inducement to insurance or after insurance has been effected, directly or indirectly offer, promise, allow, give, set off or pay to the insured or to any employee of the insured any rebate, discount, abatement or reduction of premium or any part thereof named in any insurance contract or any commission thereon or earnings, profits, dividends or other benefit or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.

“The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker or solicitor guilty of violating any provisions contained in * * *”—certain sections, naming [301] them. No such insurer, general agent, agent, broker or solicitor shall, following any such revocation, be eligible for a certificate of authority or license within one year after such revocation.

"No insured person shall receive or accept directly or indirectly any rebate or premium or part thereof or any favor, advantage, share in dividends or other benefits or any valuable consideration or inducement not specified or provided for in the policy or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker or solicitor."

I instruct you that there is nothing in the Insurance Code of the State of Washington which would render void a special contract for the extension of new rates to an earlier contract, if you find such contract was made.

The plaintiff contends that the defendant is liable for a total premium of \$47,753.72 on the basis of an account stated between the plaintiff and the defendant. An account stated is an agreement between parties who have had previously monetary [302] transactions that all the items of account representing such transactions and the balance struck are correct, together with a promise, express or implied, for the payment of such balance.

The rendering of an account by one party to another is not alone sufficient to make it an account stated. The crucial factor is whether the parties intended to agree upon the account so rendered. On one hand there must be evidence to show that the party sought to be charged has by his language or conduct admitted the correctness of the account.

If a person receiving an account statement keeps it beyond a reasonable time or makes payment upon

it without objecting to its accuracy, this may be evidence of his admission that the account is correct.

On the other hand, a person receiving an account statement does not admit its correctness even though he keeps it without protest where he has no knowledge or opportunity for knowledge of all the circumstances concerning the account, or where the account is at variance with a special contract between the parties.

If you find there is in this case an account stated as between plaintiff and defendant, then your [303] verdict should be for plaintiff, but if you find there was no account stated as I have just defined it, you will disregard this issue respecting account stated.

If from a preponderance of the evidence you find that J. C. Beeson advised the defendant that a bond rate reduction was under consideration by plaintiff and that defendant would get the benefit of any such rate reduction if the reduction was effected prior to the furnishing of the performance and payment bonds, but that if the bond rate was changed after the effective date of the bonds in question no reduction could be given defendant, then plaintiff would be entitled to recover. If, however, you are convinced that Mr. Beeson promised and agreed that if the bond rates were reduced as contemplated he would see to it that defendant got the benefit of such reduction without reference to the effective date of the bonds in question, then your verdict should be for the defendant.

You are the sole and exclusive judges of the

evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each.

In weighing the testimony of a witness you have a right to consider his demeanor upon the witness [304] stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

It is the duty of the Court to instruct you as to the law governing the case, and you must take such instructions of the Court to be the law. You will consider such instructions as a whole and will not select any one of them and place undue emphasis on that one instruction.

If the Court has repeated or emphasized [305] more than another any instruction in whole or in part or has seemed to the jury to have done so,

you will disregard as unintended and without effect any such repetition or emphasis by the Court.

You will consider all evidence admitted by the Court and now before you, and you will disregard all evidence offered but not admitted by the Court and all evidence stricken out by the Court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by Counsel during the trial, and you should not allow the making of objections and the taking of exceptions by Counsel to influence or confuse you.

Statements, if any, by Counsel or the Court unsupported by your own recollection of the evidence you will disregard, and you will disregard all statements made by Counsel and the Court to each other during the trial.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of [306] the other and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law and all are entitled to exact justice at your hands.

While it would be proper for me as the Trial

Judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case it will not be and has not been for the purpose of indicating any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts.

If you can conscientiously do so, you are expected to agree upon a verdict in this case. The matter that has been submitted to you for your consideration is an important and serious one, as are all cases submitted to juries. You should bring to your consideration of this case your earnest and honest endeavor to solve it justly and properly with [307] due regard to the rights of both the plaintiff and the defendant.

Let me say to you that you should freely consult with one another in the jury room after you retire to consider your verdict. If any one of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper for you to adhere to your own view if after a full exchange of ideas with your fellow jurors you still believe you are right.

I might add this further thought to the jurors by way of explanation of the present status of the case: Counsel in the case on both sides have

brought before the Court and jury all of the admissible evidence available to them to properly enable the jury and the Court to perform their respective functions. The Court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the Trial Judge what more could be done to properly enable the jury to perform its duty. You now have all the means necessary to a decision in this case.

In this court the instructions in written form are not sent to the jury room. Also, written [308] transcripts of the testimony orally stated from the witness stand will not be sent to the jury room. It is for the jury to remember the evidence and the Court's instructions.

Immediately upon your retiring to the jury room to consider your verdict you will select one of your number as foreman of the jury.

The pleadings in this case and the pretrial order will not be sent to the jury room, as the issues are simple and have been sufficiently explained during the course of the trial, during the arguments of Counsel and in the Court's instructions.

You will take with you to the jury room the admitted exhibits in the case, and you will also be given for your convenience in the jury room two forms of verdicts which the Clerk of the Court has prepared for your convenience. These verdicts are in the usual form in matters of this nature. One of them, as you will plainly see when you look at the two verdict forms, is for your use if you find for the plaintiff. It is called Verdict for

Plaintiff. And one of those two forms is a verdict form for you to use in case your verdict is for the defendant. Likewise that form can easily be identified by you upon observing the two verdict forms. This one, the last one mentioned by [309] the Court, the one for your use in case you find for the defendant, is entitled Verdict for Defendant.

When you reach your verdict, if the same is for the plaintiff, you will in that event have your foreman sign that verdict. If you find for defendant, you will in that event use the appropriate form provided therefor and have your foreman sign it. You will discard the form of verdict not used by you.

It is necessary that all of you agree on your verdict, and when so agreed upon you will cause your foreman to sign your verdict and return with it into open court. Nothing but a unanimous verdict, which is the verdict of each one and all twelve of you, will be received or accepted by the Court.

Counsel, have I overlooked anything?

(No response.)

The Court: If there are any exceptions to be noted by Counsel to the giving or failure to give requested instructions or to the giving of instructions, I shall, upon being so advised, temporarily excuse the jury from the jury box for that purpose, as the law provides shall be done in every case.

Does the plaintiff wish to note any exceptions?

Mr. LeGros: Yes, your Honor.

The Court: Does the defendant wish to note [310] any exceptions?

Mr. Palmer: Yes, your Honor.

The Court: Members of the jury, this case has not yet been submitted to you finally for your deliberation and verdict. That will be done later, not now. You are now being again, as in the past, temporarily, only temporarily excused from the jury box during another brief time. During that absence from the jury box do not discuss this case among yourselves or make any expression about it at all among each other. Your opportunity to do that and your duty to do that will be given you later, not now. It will be given you after this recess.

You may now temporarily retire from the jury box, subject to all of the Court's previous admonitions dealing with receiving information about or discussing this case.

(The following proceedings were had without the presence of the jury):

The Court: Now, in the absence of the jury, excused temporarily for that purpose, plaintiff's Counsel may note plaintiff's exceptions.

Mr. LeGros: If the Court please, comes now the plaintiff and notes its exceptions to the failure of the Court to give certain requested instructions and [311] to certain instructions as given by the Court.

First we wish to note an exception to the failure of the Court to direct a verdict for the plaintiff as asked for in one of the plaintiff's requested instructions.

The Court: Allowed.

Mr. LeGros: Secondly, if the Court please, we except——

The Court: Mr. LeGros, may I interrupt you. That was No. 15. This will be identified as 16.

Mr. LeGros: It is Requested Instruction 16.

Secondly, if the Court please——

The Court: The Court allows that exception.

Mr. LeGros: The plaintiff excepts to that instruction whereby the jury was instructed that such a special agreement as was testified to here is not a void contract.

That exception is based upon our consistent holding in this case as best set out in our filed exceptions to the affirmative defenses as contained in the pleadings, fully setting forth our views and contention on the Way case.

The Court: Allowed.

Mr. LeGros: Third, your Honor, the plaintiff excepts to that instruction stating that, "If, however, [312] you are convinced that Mr. Beeson agreed that if the board rates were reduced as contemplated he would see to it that the defendant got the benefit of such reduction without reference to the effective date of the bonds in question," we except on the same grounds as previously stated, that this instruction is based on the Way case and we have previously noted in this file and in this cause our objections to that case and our consideration of that case.

The Court: Allowed.

Mr. LeGros: Beyond that the plaintiff has no exceptions.

The Court: The defendant may now note in the record defendant's exceptions.

Mr. Palmer: Your Honor, the defendant objects first to the Court's instructions containing any mention of the Insurance Code of the State of Washington on the ground that in accordance with the memorandum which the defendant has previously furnished the Court which is on file concerning the Way case, the effect of the Insurance Code on a contract of this kind is a matter of law to be decided only by the Court, and while the Court has indicated in a portion of its instruction on the Insurance Code that the Code does not render the agreement in issue here void, nevertheless the remainder [313] of the Code which was inserted in the instructions at length is directed to criminal penalties and which have no application in this civil case and are prejudicial to the defendant.

The Court: Allowed.

Mr. Palmer: The defendant objects also, your Honor, to the inclusion in the instructions of any mention of account stated, on the ground that, as set forth in a memorandum of authorities heretofore furnished to the Court, the doctrine of account stated has no application in a case where the matter is governed by a special agreement between the parties.

The Court: Allowed.

Mr. Palmer: Other than that the defendant has no objections to the instructions, your Honor.

The Court: Is there anything else to be said in the absence of the jury before the final submission of the case to the jury for its deliberation of its verdict or which concerns any matter or thing which should be considered before that is done?

Mr. LeGros: The plaintiff asks for no further consideration.

Mr. Simon: The defendant likewise, your Honor.

The Court: Bring in the jury.

(The following proceedings [314] were had within the presence of the jury):

The Court: Let the record show that all of the jurors have returned to their places and are now in the jury box as before the recess and that all others are present as before the recess.

The Clerk will now swear the bailiffs.

(Two bailiffs were sworn by the clerk of court.)

The Court: Members of the jury, this case is now fully, finally and unreservedly submitted to the jury for its deliberation and verdict.

You the jury will now retire to the jury room to consider your verdict, being hereafter in the conduct of the bailiffs, and you will hereafter remain together at all times until discharged by the Court from further consideration of this case.

And just before retiring may I make a suggestion to you which is not an instruction on the law, it is a suggestion made for whatever value you may wish to attach to it and for whatever consideration, if any, you may wish to give it. It is not in any respect binding on you. It is merely a suggestion

for whatever you may think it is worth concerning the selection of your foreman. [315]

In connection with the selection by you from among your number of your foreman I suggest that you should indulge some of the considerations which may properly, and you have observed as proper, apply to the selection of a leader in any other activity in life. Do not select a foreman with a view to yielding to his views on the facts, but try to have in mind the ordinary qualifications of leadership and of acceptable and agreeable personality and ability to deal with others.

The position of foreman is one of responsibility and leadership, and a good foreman sometimes can by proper acts of leadership and without infringing upon the independence and responsibility of each juror separately so conduct and lead the hearings and deliberations and discussions among the jurors as to save time and help each and all of the members of the jury accomplish the greatest good and the most work in the most efficient and agreeable and proper manner merely by his qualifications of leadership.

I repeat, this is not in any way an instruction which in any way governs your thought or your action, it is merely for whatever consideration you may wish to give it.

The jury will now retire to deliberate and consider your verdict. [316]

(Thereupon, at 11:07 o'clock a.m., the jury retired to consider its verdict, and the follow-

ing proceedings were had without the presence of the jury):

The Court: I will not undertake to make any suggestion about remaining in court until the jury retires for lunch, but if it reaches a verdict before twelve o'clock you might wish that you had remained here and not had to spend the additional time of coming here from your office. However, as to how you will manage that I will leave in your hands, but if you do leave this floor of the building will you not please let the bailiff know very accurately where you can be reached on the phone at any and every minute during your absence from this floor until this jury is discharged from further consideration of this case so that in case you wish to be advised that the jury is ready to report its verdict you can be so advised and can thereafter get here with the shortest possible lapse of time. Is that agreeable with Counsel?

Mr. LeGros: Yes, your Honor. If the Court please, if by twelve o'clock a verdict is not reached are we to assume then the jury will go to lunch and we will be free from——

The Court: They will be invited to go to lunch.

Mr. LeGros: Yes.

The Court: The jury might say, "We do not wish to go to lunch. We will continue our deliberations." In that case the Court will not at least for a while insist upon their doing so. The Court usually sends word to the jurors that we usually think it best to take refreshment about this time of day and it might work to the jury's advantage

to do so, and after which they will come back and resume their deliberations. However, sometimes juries do not accept that advice. Have you any objection to the Court so advising the jury about that time, about twelve o'clock?

Mr. LeGros: I would be most surprised if they did not accept the Court's suggestion.

The Court: Have you any objection to the Court so advising them?

Mr. LeGros: No, your Honor.

The Court: Have you?

Mr. Simon: Nor do we, your Honor.

The Court: But to meet the situation if it should unintentionally arise of being unable to contact Counsel or Counsel being unable for some reason or other to get here promptly,—repeating—did you hear what I said, Mr. LeGros?

Mr. LeGros: Yes, your Honor. [318]

The Court: Then not repeating, do Counsel for each side stipulate in the record that this Court may receive this jury's verdict in the absence of Counsel, it being a civil case and since the law does not require or place upon the Court a positive duty to give to Counsel or the parties an opportunity to be here and since if in a civil case like this the parties wish to be here they should remain in attendance for that purpose?

Mr. LeGros: I am willing to stipulate that the verdict may be received in the absence of Counsel.

Mr. Simon: The defendant will likewise so stipulate.

The Court: Let the record show that. I wish

to add, Counsel, that the Court will do everything it can to advise Counsel so they can get here if they want to.

Mr. LeGros: Thank you, your Honor.

Mr. Simon: Thank you very much.

(Thereupon, at 11:10 o'clock a.m., Friday, May 17, 1957, an adjournment herein was had.)

[Endorsed]: Filed Aug. 19, 1957.

[Endorsed]: No. 15681. United States Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a corporation, Appellant, vs. Anderson Construction Co., Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: August 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15681

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellant,
vs.

ANDERSON CONSTRUCTION CO., INC., a cor-
poration, Appellee.

APPELLANT'S STATEMENT
OF POINTS

The appellant in its appeal intends to rely upon the following points:

1. That the alleged oral agreement whereby the appellant would accept and the appellee would pay for surety bonds a premium less than that fixed by the applicable legal rate as filed with and approved by the Insurance Commissioner of the State of Washington was void because expressly prohibited by statutes of the State of Washington.

2. That the appellant's agent had no authority, express or implied, to bind the appellant upon any illegal agreement prohibited by statute whereby the appellant would accept and the appellee would pay any premium other than the lawful premium for the surety bonds involved.

3. That the appellant is entitled to recover upon

the basis of an "account stated" between the appellant and the appellee.

4. That the District Court erred in denying appellant's motion for judgment notwithstanding the verdict upon the ground that all of the evidence established the existence in law and in fact of an "account stated" upon which appellant was entitled to recover. (Dist. Ct. Documents #42, #43.)

5. That the District Court erred in denying appellant's motion for judgment notwithstanding the verdict upon the ground that no evidence tended to show either J. C. Beeson or McCollister & Co., Inc., was ever given by the appellant any authority, either express or apparent, to enter into any agreement prohibited by the statutes of the State of Washington whereby the appellant would charge and the appellee would pay less than the legal premium for the surety bonds involved. (Dist. Ct. Documents #42; #43.)

6. That the District Court erred in denying appellant's motion for judgment notwithstanding the verdict upon the ground that all of the evidence established that the appellant gave no authority, either express or apparent, to J. C. Beeson or McCollister & Co., Inc., to enter into any contract giving appellee any premium rate other than that established by law. (Dist. Ct. Documents #42; #43.)

7. That the District Court erred in denying appellant's motion for new trial upon the ground of

its error in refusing to give appellant's requested instruction for a directed verdict in its favor. (Dist. Ct. Documents #42; #43; #37; #47, Reporter's Transcript, pp. 311, 312.)

8. That the District Court erred in denying appellant's motion for new trial upon the ground of its error in overruling appellant's exceptions to the appellee's affirmative defense based upon the alleged special agreement for an illegal lower premium. (Dist. Ct. Documents #42; #43.)

9. That the District Court erred in denying appellant's motion for new trial upon the ground of its error in instructing the jury that the alleged special agreement for an illegal lower premium, if made, would not be void as a matter of law. Dist. Ct. Documents #42; #43; #47, Reporter's Transcript, pp. 302, 312.)

10. That the District Court erred in denying the appellant's motion for new trial upon the ground of its error in instructing the jury that if the alleged special agreement for an illegal lower premium was made, the jury's verdict should be for the appellee. Dist. Ct. Documents #42; #43; #47, Reporter's Transcript, pp. 304, 312, 313.)

/s/ LANE SUMMERS,

/s/ THEODORE A. LeGROS,

Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Aug. 23, 1957. Paul P. O'Brien, Clerk.

No. 15681

United States Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation, *Appellant*,

vs.

ANDERSON CONSTRUCTION Co., Inc., a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

LANE SUMMERS

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THE ARGUS PRESS, SEATTLE

FILED

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PAID BY MAIL PERMIT NO. 2545 SEATTLE, WASH.

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United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,	<i>Appellant,</i>	} No. 15681
vs.		
ANDERSON CONSTRUCTION CO., INC., a corporation,	<i>Appellee.</i>	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

This civil action at law was commenced by complaint filed in the U. S. District Court at Seattle by the Appellant United States Fidelity & Guaranty Co. against the Appellee Anderson Construction Co., Inc. The complaint alleged that the Appellant was a Maryland corporation and the Appellee was a Washington corporation, and that the amount in controversy was in excess of \$3,000.00, exclusive of interest and costs. (R. 3) The Appellee's answer admitted these jurisdictional allegations. (R. 18)

The jurisdiction of the U. S. District Court for the Western District of Washington, Northern Division is based upon USC Title 28, Section 1332.

The jury's verdict for the Appellee was filed the 17th of May 1957. (R. 83) Judgment being entered thereon,

the Appellant's motion for judgment notwithstanding the verdict, or in the alternative, for order granting new trial, was filed the 25th of May 1957. (R. 85) Order denying Appellant's said motion was filed the 17th of June 1957. (R. 87) Appellant's notice of appeal was filed the 16th of July 1957. (R. 88)

The jurisdiction of the U. S. Court of Appeals for the Ninth Circuit is based upon USC Title 28, Section 1291.

STATEMENT OF THE CASE

The Appellant was a corporate surety authorized to conduct a bonding business in the State of Washington. Its general agent at Seattle was McCollister & Co., Inc.

The Appellee was engaged in business as a contractor and was associated with two other corporate contractors in a joint venture on a large construction job for the United States.

By this action the Appellant sought to recover the unpaid balance of its premium for performance and payment bonds executed for the Appellee as principal by the Appellant as surety in favor of the United States as obligee.

Appellant's complaint alleged that the Appellee signed a written application dated the 3rd of June, 1955 (attached as Ex. A) for such bonds containing Appellee's joint and several promise to pay premium therefor in the specified sum of \$47,753.72; that such bonds (attached as Ex. B and Ex. C) had been accepted by the United States; that premium payments had

been made aggregating the sum of \$23,876.86; and that the Appellee had refused to pay the delinquent balance in the sum of \$23,876.86 which was still owing. (R. 3-18)

Appellee's answer, after admitting said partial payments, alleged affirmatively that when such application was signed it remained blank as to the amount of premium which was left unspecified, the agent for Appellant then representing that its present premium rates would be reduced in the near future and that Appellee would be given the benefit of the reduction; that Appellant's premium rates were reduced; and that at such rates the agreed total premium amounted to the lesser sum of \$35,576.79.

Appellee's answer, in addition, alleged tender to Appellant of two checks in the total sum of \$11,699.93, claiming such amount to be the total balance owing on the full premium chargeable by Appellant under the oral agreement for reduction. (R. 18-21)

Appellant's reply, filed in lieu of amended complaint under order of court (R. 28), denied making any oral agreement whereby lesser premium at future reduced rates would be charged to and accepted from the Appellee.

Appellant's reply alleged that the two checks tendered by Appellee were rejected because the amounts payable thereon were calculated upon the basis of reduced premium rates not applicable to the bonds which became effective when accepted by the United States, before or on the 17th of June 1955.

Appellant's reply also alleged that in receiving the Appellee's said application and in executing said bonds,

Appellant was subject to the Insurance Code of the State of Washington (Washington Session Laws 1947, Chapter 79 as amended); that as directed thereby Appellant had caused to be filed with and approved by the Insurance Commissioner its premium rates which became effective on the 30th of April 1951 and continued effective until the 20th of July 1955—the same being operative as to said application and said bonds, and being binding upon both the Appellant and the Appellee; and that computed according to said rates the correct premium chargeable by the Appellant and payable by the Appellee was \$47,753.72.

Appellant's reply (quoting verbatim) finally alleged that said Insurance Code contained mandates and prohibitions requiring the Appellant to charge and the Appellee to pay as the legal premium only the amount fixed by the applicable rates as filed and approved. (R. 28-33)

From this summary of the issues, it is obvious that to the Appellant's cause of action the Appellee's sole defense is an unlawful oral agreement for a reduced premium in violation of an express statute.

By the verdict (R. 83) the jury found the oral agreement had been made.

Before this court as in the trial court, the Appellant contends:

1. That being declared illegal by the Insurance Code of the State of Washington, the oral agreement for reduced premium was void as a matter of law.
2. That on all the evidence Appellant's agent had

neither express nor implied authority to bind it upon an unlawful oral agreement made in violation of positive statutory prohibition.

3. That the admissions in the pretrial order and the evidence established an "account stated" upon which Appellant was entitled to recover.

SPECIFICATION OF ERRORS

1. The District Court committed error (to which Appellant excepted) by refusing to give Appellant's requested instruction as follows:

"You are instructed to return a verdict in favor of the plaintiff and against the defendant in the amount prayed." (R. 80, 352)

2. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial because of its refusal to give Appellant's requested instruction as follows:

"You are instructed to return a verdict in favor of the plaintiff and against the defendant in the amount prayed." (R. 80, 84, 86)

3. The District Court erred by its order over-ruling Appellant's objection to Appellee's requests for admissions, as irrelevant because tending merely to support its sole affirmative defense based on a void oral agreement for an illegal reduction of Appellant's premium. (R. 39, 48, 49)

4. The District Court committed error, to which Appellant excepted, because of instruction given to the jury as follows:

"I instruct you that there is nothing in the Insurance Code of the State of Washington which

would render void a special contract for the extension of new rates to an earlier contract, if you find such contract was made.” (R. 345, 353)

5. The District Court committed error, to which Appellant excepted, because of instruction given to the jury as follows:

“If, however, you are convinced that Mr. Beeson promised and agreed that if the bond rates were reduced as contemplated he would see to it that defendant got the benefit of such reduction without reference to the effective date of the bonds in question, then your verdict should be for the defendant.” (R. 346, 353)

6. The District Court erred by its order denying Appellant’s motion for judgment notwithstanding the verdict or for new trial because of instruction (to which Appellant excepted), given to the jury as follows:

“I instruct you that there is nothing in the Insurance Code of the State of Washington which would render void a special contract for the extension of new rates to an earlier contract, if you find such contract was made.” (R. 345, 353, 84, 86)

7. The District Court erred by its order denying Appellant’s motion for judgment notwithstanding verdict or for new trial because of instruction (to which Appellant excepted), given to the jury as follows:

“If, however, you are convinced that Mr. Beeson promised and agreed that if the bond rates were reduced as contemplated he would see to it that defendant got the benefit of such reduction without reference to the effective date of the bonds in question, then your verdict should be for the defendant.” (R. 346, 353, 84, 86)

8. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

"That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc. was ever given any express authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defendant would pay less than the legal premium for the bonds involved." (R. 84, 86)

9. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

"That no evidence before the jury tended to show that either J. C. Beeson or McCollister & Company, Inc., was ever given any apparent authority by the plaintiff to enter into an agreement prohibited by the statutes of the State of Washington whereby the plaintiff would charge and the defendant would pay less than the legal premium for the bonds involved." (R. 84, 86)

10. The District Court erred by its order denying Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

"That all of the evidence before the jury established that United States Fidelity and Guaranty Company gave no authority express or apparent to J. C. Beeson or McCollister & Company, Inc., to enter into any contract giving defendant any premium rate other than that established by law." (R. 84, 86)

11. The District Court erred by its order denying

Appellant's motion for judgment notwithstanding the verdict or for new trial upon the ground

"That all of the evidence before the jury established the existence in law and fact of an 'account stated' upon which plaintiff is entitled to recover."
(R. 84, 86)

ARGUMENT
Agreement
Rebate ~~Argument~~ Void

The Appellant contends that the oral promise of its agent to allow Appellee a reduction in premium by calculating the amount not according to the existing effective rates as filed and approved pursuant to statute, but according to anticipated inapplicable rates neither filed nor approved, constituted under the Washington Insurance Code an illegal agreement—a rebate—unenforceable and void.

The Appellant so contended in the District Court. (R. 29-33; 59-63) Based on Specification of Errors No. 1, No. 2, No. 3, No. 4, No. 5, No. 6 and No. 7, the Appellant continues so to contend.

The District Court rightly instructed the jury "that the (Appellant) in its business as a surety and in executing said bonds was and is subject to the Insurance Code of the State of Washington as then in force." (R. 343) That Code (being Chapter 79, Session Laws 1947) contained provisions as follows:

"SEC. .19.04 Filing Required:

1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to

other insurances, and every modification of any of the foregoing which it proposes.”

“2. Every such filing shall state its proposed effective date and shall indicate the character and extent of the coverage contemplated.”

“3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.”

“SEC. .19. 05 Filings by Bureau:

1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.”

“SEC. .19.28 Deviations: 1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.”

“SEC. .30.14 Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.”

“SEC. .30.17 Receiving Rebate: 1. No insured

person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor.”

The pre-trial order of the District Court recited among other “admitted facts” (R. 56) that calculated according to the Appellant’s premium rates as filed with the Insurance Commissioner for effect after April 1951 with respect to bonds within the classification of the bonds involved in this action, the sum of \$47,753.72 was the correct amount of premium. (R. 58; Ex. 11—copy, R. 36) The pre-trial order also recited among such “admitted facts” that if figured according to the Appellant’s reduced premium rates as similarly filed on the 5th of July 1955 for effect after the 20th of July 1955, the sum of \$35,576.79 would be the correct amount of the premium. (R. 58; Ex. 12—copy, R. 37)

Appellant’s reduced premium rates not being effective until after the 20th of July 1955 were not applicable to any element of the transaction. The Appellee’s bid bond was dated the 18th of May 1955. (Ex. A-3) The written application signed by the Appellee containing its promise to pay premium for the performance and payment bonds was dated the 3rd of June 1955. (Ex. 1; copy attached to complaint, R. 12) The performance and payment bonds signed by the Appellee as principal and the Appellant as surety were dated the 31st of May 1955. (Ex. 2; Ex. 3; copies attached to

complaint, R. 13-17) Both these bonds fully executed were transmitted to the United States Engineers in behalf of Appellee by letter dated the 13th of June 1955. (R. 151; Ex. 8) Both these bonds as recited by the pre-trial order among "admitted facts" were "received by and/or for the obligee, United States of America, on or before the 17th of June 1955." (R. 57) In acceptance of such bonds notification to the Appellee and the other members of its joint venture to proceed with the performance of their construction contract was issued on the 17th of June 1955. (R. 58)

Clearly, the record contains no possible basis for any claim by the Appellee that Appellant's reduced premium rates filed on the 5th of July 1955 to take effect after the 20th of that month were operative in time to entitle the Appellee as a matter of law to the reduction sought. For this reason the Appellee has resisted the Appellant's action to collect the full amount of the legal premium only by relying upon the oral promise of its agent to allow an illegal reduction. In urging this lone defense, the Appellee is asking the court to aid it in violating Sec. .30.17 of the Insurance Code which prohibits the Appellee from receiving or accepting, "directly or indirectly, any rebate of premium."

On the factual issue the jury found that the Appellant's agent did promise to allow Appellee the benefit of future lower premium rates. On the remaining legal issue, this appeal presents the question whether such a promise is enforceable in the face of the statutory prohibition directed not only against the Appellant but *also against the Appellee* as well.

The general rule in point declares that an agreement violating a valid express statute is usually void. The general rule was recognized by Chief Justice Marshall more than a century ago when his opinion said:

“Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law.”

Armstrong v. Toler, 11 Wheat. (US) 258, 271; 6 L.Ed. 468, 472.

“It is a general rule that an agreement which violates a provision of a Constitution or of a constitutional statute or which cannot be performed without violation of such a provision is illegal and void. In this respect there is no distinction between statutes and ordinances. This is the general rule whether the consideration to be performed or the act to be done is unlawful. Thus, a promise made in consideration of an act which is forbidden by the United States Constitution is illegal. An agreement in violation of a law is illegal whatever may have been theretofore decided by the courts to have been the public policy of the country on the subject.”

12 Am. Juris. P. 652, Sec. 158.

“An agreement directly and explicitly prohibited by a constitutional statute in unmistakable language is ordinarily void and no recovery can be had thereon. When a contract, express or implied, is tainted with the vice of violation of law as to the consideration of the thing to be done, no alleged right founded upon it can be enforced in a court of justice.”

12 Am. Juris. P. 655, Sec. 160.

However, since the decision of the United States Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, the general rule is to be applied on this appeal in harmony with the law of the State of Washington—hence, discussion of cases decided in that jurisdiction.

The earlier opinions of the Washington Supreme Court adopted the general rule.

A conditional sale vendor who sold furniture and furnishings to prostitutes for use in their house of prostitution was denied recovery of possession because the operation of their business was a statutory crime. The court's opinion said:

“No principle of law is better settled than that a contract prohibited by law or morality is void as against public policy.”

Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 677; 62 Pac. 145.

Upon an action to recover money paid for medical treatments to which the plaintiff refused to submit because the defendant was an unlicensed physician practicing in violation of statute, Judge Rudkin's opinion said:

“Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void.”

Deaton v. Lawson, 40 Wash. 486, 490; 82 Pac. 879.

In passing, it is noteworthy that this ruling with quotation of Judge Rudkin's language was approved very much later by the Washington Supreme Court in *State ex rel. Standard Optical Co. v. Superior Court*, 17 Wn.(2d) 329; 135 P.(2d) 839; and in *State v. Boren*, 36 Wn.(2d) 522, 527; 219 P.(2d) 566.

In another early case, a woman afflicted with tuberculosis was denied damages for breach of promise to marry because performance of the contract would have violated the Washington statute making it the duty of all persons to avoid spreading the disease. Refusing relief the Supreme Court said:

"It is a fundamental proposition that a contract contravening the provisions or policy of a public law is void or voidable. *Macintosh v. Renton*, 2 Wash. Ter. 121."

Grover v. Zook, 44 Wash. 489, 501; 87 Pac. 638.

Defense against action upon a promissory note purchased after maturity was held to be good upon the ground that the consideration for the note was a loan by a brewery in violation of a Washington liquor statute. In so ruling, the court said:

"The court listens to this defense not because of any desire to aid the maker of the note—indeed he is usually as culpable as the payee—but listens to it because of the public policy involved; because the parties in entering into the contract have violated the statute. A court will not knowingly aid in the furtherance of an illegal transaction."

Lewer v. Cornelius, 72 Wash. 124, 129; 129 Pac. 911.

With subscription for stock in the defendant corporation, the plaintiff received the corporation's \$1,000.00 bond promising to pay thereon if stock dividends were not declared and paid up to that amount within a limited time. The bond was held to be void, the Supreme Court saying:

"It being established in this case that there were no profits out of which this dividend could be declared, it follows that, if the bond be enforced against the corporation, payment must be made out of its capital, which the law will not permit, upon the ground that any contract whereby a corporation seeks to diminish its capital stock, except in some way permissible by statute, contravenes public policy and is unenforceable."

Jorguson v. Apex Gold Mines Co., 74 Wash. 243, 244; 133 Pac. 465.

A subscriber to corporate stock sued upon a contract wherein the corporation promised to repurchase the stock at the price paid by him if he became dissatisfied as an employee. In denying recovery, the Supreme Court said:

"We have discussed this case upon general lines, not because we have doubted the application of the statute, but because of the fact that many of the American courts have been disposed to write an exception into the statute in favor of contracting parties where the rights of present creditors are not involved. We have endeavored to show that the contract is contrary to public policy as well as violative of the letter and spirit of the statute law."

Kom v. Cody Detective Agency, 76 Wash. 540, 547; 136 Pac. 1155.

An action to recover expenses incurred pursuant to

agreement for the promotion of an election to recall an elected public official in violation of a Washington statute was dismissed, the opinion saying:

“Where a plaintiff, to make a case, must rely upon the illegal contract itself, he cannot recover.”

Stirtan v. Blethen, 79 Wash. 10, 16; 139 Pac. 618.

The Washington Supreme Court recognized the general rule by a quotation from the United States Supreme Court as follows:

“The general rule of law is, that a contract made in violation of the statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.”

Ferguson-Hendrix Co. v. Fidelity & Dep. Co., 79 Wash. 528, 533; 140 Pac. 700.

In an action by a female to recover wages as fixed by the Washington minimum wage statute, it appeared that she had signed an agreement to compromise her claim under which she still had not received the prescribed minimum. Although the statute in terms did not make the compromise void, it was held to be unenforceable in an opinion saying:

“The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage in which the state did not participate is voidable, if not void.”

Larsen v. Rice, 100 Wash. 642, 650; 171 Pac. 1037.

A dairy company required its workers to sign an agreement that if they quit their jobs without giving advance notice of two weeks their wages would not become payable for thirty days. The Washington statute required wages to be paid "forthwith." In this case, Washington Supreme Court said:

"It is clear that the statute establishes a rule of public policy, and that the natural right of the employer and the employee to contract between themselves must yield to what the legislature has established as the law. To hold otherwise would put it within the power of every corporation employing labor, by exacting a contract before employing, to set at naught the plain provisions of the statute."

Burdette v. Broadview Dairy Co., 123 Wash. 158, 163; 212 Pac. 181.

An unlicensed architect was disallowed recovery of fees under contract for his services rendered in violation of statute. After a rehearing by the Washington Supreme Court, *en banc*, it stated:

"This act does not in express terms make the mere rendering of architectural service by one not holding a license certificate unlawful, nor does it in express terms make a contract for such services by one not holding a license certificate unlawful and unenforceable; but the language of the act manifestly expresses the legislative intent that it shall be unlawful for one not holding a license certificate to assume the professional title of architect and as such enter into a contract to render architectural services. Now that is just what Travis did with reference to the construction of this building. He not only held himself out to Wise and wife

as being an architect possessing architectural skill and learning, prior to the making of his contract of services with them, but he prepared plans and specifications in such detail as is usual for the construction of buildings of the dimension and cost of the one in question. The several sheets of the drawings of the proposed building, of which the specifications were a part, were signed by Travis as architect. In the text of 13 C.J. 423, we read:

“ ‘Where a license or certificate is required by statute as a requisite for one practicing a particular profession, an agreement of a professional character without such license or certificate is ordinarily held illegal and void. This is true, for example, of an agreement made by an unlicensed or uncertificated physician, an attorney at law, a conveyancer, an engineer, or a school-teacher. The authorities are in accord on this point, where the license is required for public protection and to prevent improper persons from acting in a particular capacity and not for revenue purposes only.’

“Numerous decisions of the courts are there cited in the footnote lending unqualified support to this view of the law. In *Wedgewood v. Jorgens*, 190 Mich. 620, 157 N.W. 360, the court quotes the above text from 9 Cyc. 478, now found in 13 C.J. 423, in support of its holding that an unlicensed architect, the law requiring him to be licensed, cannot recover for architectural services performed by him because his want of license renders the contract illegal and unenforceable. Our own decisions in *Kimball v. School District No. 122*, 23 Wash. 520, 63 Pac. 213, and *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 111 Am. St. 922, 2 L.R.A.

(N.S.) 392, involving claims of recovery sought by an unlicensed public school teacher and an unlicensed physician, are in harmony with this view of the law. In 30 A.L.R. 834 is an exhaustive note wherein may be found overwhelming support of the view of the law announced in the above quotation from Corpus Juris and our decisions in the Kimball and Deaton cases above noted. We think there is no escape from the conclusion that the contract for architectural services between Travis and Wise and wife, upon which Sherwood seeks recovery, was illegal and void and wholly unenforceable, leaving Travis and Sherwood, his assignee, without legal right of recovery thereon."

Sherwood v. Wise, 132 Wash. 295, 300; 232 Pac. 309.

Sound Ferry Lines, an intrastate water carrier, filed its tariff rates as required by law. Later it made special contracts with a bus company to transport passengers at lesser rates for which no tariff had been filed. The Washington statute prohibited the water carrier from charging or accepting either more or less than rates fixed by its tariff as filed. The Supreme Court held these special contracts unenforceable.

"It seems to us that the entering into and acting under these special contracts was in plain violation of the provisions of our public service statutes, above quoted. The rates so especially agreed upon were manifestly not intended as regular rates applicable to all stages, and were manifestly discriminatory in favor of the Wolverton Company."

Wolverton Auto Bus Co. v. Robinson, 151 Wash. 67, 76; 274 Pac. 1056.

A contract for conveyance of land on which pay-

ments had been made was declared void because the vendee was an alien who could not own real property under the Washington Constitution. Dealing with the matter, the Supreme Court said:

“When it developed that the contract was illegal, the court would not, of course, enforce it. But it will lend its aid to the relief of the parties from the situation in which they have inadvertently placed themselves. It will free the land involved from the apparent lien of the contract; it will relieve the parties from any obligation under the contract; and will measure out to them such further relief as the facts justify.”

Baker v. Knight, 160 Wash. 500, 504; 295 Pac. 174.

Under a contract for commission a realtor, before issuance of his license as required by law, performed services in negotiating a sub-lease. By the terms of his contract commission was payable out of the rental for the first month under the sub-lease. Before the rental was due the realtor's license was issued. The Supreme Court held the contract for commission unenforceable, saying:

“Appellant's agreement to perform, and its performance of, the alleged service, was illegal. When a plaintiff, to make a case, must rely upon an illegal contract or upon the performance of an illegal act, he cannot recover. *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L.R.A. (N.S.) 392, 111 Am. St. 922; *Stirtan v. Blethen*, 79 Wash. 10, 139 Pac. 618, 51 L.R.A. (N.S.) 623; *Moser v. Pantages*, 96 Wash. 65, 164 Pac. 768.

“If appellant's contention were sustained, then

the obvious purpose of the statute could be easily and entirely circumvented."

Irons Investment Co. v. Richardson, 184 Wash. 118, 126; 50 P.(2d) 42.

In a suit by the State as owner of public land to recover certain royalties, on contract specifying the rates for calculating such royalties as required by statute, the defense was based upon full payment of lower royalties later adopted in the so-called "agreement of 1934" which disregarded the statutory rates. The defense failed.

"First, as to proposition (1), it is the general rule that a contract which is contrary to the terms and policy of an express legislative enactment, is illegal and unenforceable. 6 Williston on Contracts 5021, Sec. 1768; see 2 Restatement of the Law, Contracts, Sec. 580." * * * "It follows, from what we have said, that the promise of 'agreement' of 1934 was not authorized by our statutes then in force, and was indeed contrary to the policy of those legislative enactments, and, hence, was illegal."

State v. Northwest Magnesite Co., 28 Wn.(2d) 1, 26, 27; 182 P.(2d) 643.

Contracts attempting to avoid a statute enacted to protect the public against losses in the purchase of promotion mining stock were held unenforceable in an opinion saying:

"It is a general rule that where the contract grows immediately out of, and is connected with, an illegal act, a court of justice will not lend its aid to enforce it. *Armstrong v. Toler*, 24 U.S. 115, 6 L.Ed. 468, 11 Wheat. 258. Where a plaintiff, to make a case, must rely upon the illegal contract itself, he

cannot recover. The law will aid neither party to an illegal agreement, but will leave the parties where it finds them. *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L.R.A. 404. A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceible."

Hederman v. George, 35 Wn.(2d) 357, 361; 212 P.(2d) 841.

As already noted, by a rather recent opinion enjoining the unlicensed practice of dentistry, the Washington Supreme Court repeated with approval the much older comment of Judge Rudkin in *Deaton v. Lawson*, 40 Wash. 486, 490 when he said:

"Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent. a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void."

State v. Boren, 36 Wn.(2d) 522, 527; 219 P. (2d) 566.

This chronological review of numerous cases decided over a stretch of many years by the Washington Supreme Court seems sufficient to show its long adherence to the general rule as briefly stated by Chief Justice Marshall in *Armstrong v. Toler*, 11 Wheat. (US) 258, 271; 6 L.Ed. 468, 472. Such being the situation, the Appellee must bear the burden of supporting its affirmative defense by demonstrating that the Washington Supreme Court by rulings involving the prohibition of the Insurance Code against premium rebates has departed from the general rule so definitely that

this court cannot enforce the general rule as the law applicable in the State of Washington.

In this effort, before the District Court, the Appellee's brief relied almost entirely upon a single ruling of the Washington Supreme Court which the Appellee characterized as "controlling"—the case of *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332; 133 Pac. 595. The Appellant disagrees. Although requiring explanation, the decision is not controlling upon this court.

As recited by the opinion in the *Way* case, the plaintiff and his partner Gould were in business as insurance agents. Through Gould the partnership caused certain insurance policies to be issued in favor of the defendant corporation at a rate of premium less than the "Board" rate. The agreed premium was paid. Thereafter Gould upon withdrawing from the partnership assigned all his interest to the plaintiff, who sued for the unpaid difference between the higher "Board" premium and the lower agreed premium. The court held that "the plaintiff cannot recover upon general grounds". (74 Wash. 333)

A careful reading of the opinion discloses that the real reason for denying recovery to the plaintiff was his failure to prove a contract or promise by the defendant to pay more than the amount already paid. The opinion said: "Plaintiff can only recover upon a contract, express or implied". (74 Wash. 333) In final conclusion the opinion said: "It follows, there being no contract or promise made by the defendant to pay a greater sum than has been paid, and none being im-

plied by statute, that the judgment should be affirmed". (74 Wash. 334)

This ruling by the Washington Supreme Court spotlights a vital difference between the facts involved in the *Way* case and the facts involved on this appeal. In this action the Appellee did contract and promise to pay the higher legal premium. The Appellee expressly so bound itself in its application for the bonds to be executed by the Appellant. This document (omitting language presently immaterial) provided: "Each of the undersigned * * * hereby agrees as follows: First, to pay or cause to be paid to the Company in advance a premium of \$...... for the bid or proposal bond (the same to be credited on the premium for the performance bond if executed or procured by the Company, and a premium of \$47,753.72 for the performance bond * * * " (Original, Ex. 1; copy attached to complaint as Ex. A; R. 6, 7, 8)

This obligation the Appellee admittedly signed. (R. 56) However, according to testimony which the jury apparently believed, the Appellee's signature was subscribed before the numerals specifying the amount of the premium were inserted in the blank on the printed application form. But despite such a circumstance—important in some instances, unimportant in this instance—the document still constituted an express contract or promise by Appellee, because it also provided: "Each of the undersigned * * * hereby agrees as follows: * * * Ninth, that the Company may fill up any blanks left, or correct any errors in filling up any blanks, herein * * * ". (Original, Ex. 1; copy attached to complaint as Ex. A; R. 6, 7, 11)

In other words, even assuming the Appellee signed the application in blank as to the premium figure, it authorized the Appellant to insert the same when calculated. Presumably the Appellee will urge the contention that the Appellant was not authorized to insert the sum of \$47,753.72 (the legal premium, but was only authorized to insert the sum of \$35,576.79 (the rebate premium). But such a contention is not available to it. Later the Appellee signed as principal its performance bond in favor of the United States—an obligation on the Government's "Standard Form 25. * * * prescribed by General Services Administration General Regulation No. 5." The instructions embodied therein stated: "There shall be no deviation from this form except as authorized by the General Services Administration". The form required a specification of the "total amount of premium charged". As signed by the President and certified by the Assistant Secretary of the Appellee this important item was stated to be \$47,753.72. (Ex. 2; R. 57) The Appellee's performance bond with its payment bond were mailed to the United States Engineers for the Appellee by the manager of its joint venture with letter of transmittal dated the 13th of June 1955. (8x. 8; R. 151) Thus, to the United States the Appellee represented that its bond cost was \$47,753.72. All these admitted facts force one necessary legal conclusion, namely, that the Appellee ratified the act of the Appellant when it inserted in Appellee's application for the bonds the premium figure of \$47,753.72. Considering such facts, the Appellee should not be heard to say that it never contracted or promised to pay the legal premium.

Continuing discussion of the *Way* case, it differs markedly from this action for other considerations. There the only contract sued on had been completely performed by full payment; here the legal contract sued on has been but partly performed by installment payments. There the party plaintiff sought the aid of the court to avoid the rebate agreement; here the party defendant sought the aid of the court to enforce the rebate agreement.

Again the opinion of the Washington Supreme Court reflects the moving influence of another element present in the *Way* case but absent in this action. By its very brief comments, the opinion observed that in the old Insurance Code (Laws 1911, Chapter 49), Section 33 which prohibited rebates provided for the imposition of a severe penalty against "the property owner by reducing the insurance in such proportion as the amount of the rebate bears to the total premium." (74 Wash. 333) There the premium in dispute was consideration for insurance policies issued to protect the defendant as assured; here the premium in dispute was consideration for surety bonds issued to protect not the defendant but the United States as obligee. For patent reasons neither the former nor the present provisions of the Insurance Code outlawing premium rebates have attempted to impose a reduction of protection as a penalty applicable to surety bonds issued for the benefit of third parties.

In the *Way* case it is true the opinion contained a remark quoted by the Appellee in support of its defense, wherein Washington Supreme Court said:

“Plaintiff’s error lies in the assumption that the contract between the co-partnership (the insurance agency) and the defendant (the insured) was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act.” (74 Wash. 333)

As already demonstrated that remark was merest dictum apart from the “general grounds” upon which the decision was explicitly based. However, that remark coupled with the admitted facts recited as surrounding the Appellant’s cause of action, draws into sharp focus other provisions of the Insurance Code now effective (Laws 1947 Chapter 79) to-wit: Sec. .18.18 and Sec. .18.19 contained in Article 18 entitled on the general subject of “The Insurance Contract.”

“Sec. .18.18 *Stated Premium Must Include All Charges*: 1. The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.”

“Sec. .18.19 *Must Contain Entire Contract*: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”

As necessarily interpreted in the application of the Insurance Code to the surety business, the first of these sections plainly required that the correct amount of premium be stated in the bonds; and the second of these sections expressly declared that no modification of the amount of premium “shall be valid unless in writing and made a part” of the bonds.

Had these statutory provisions been in force and

under consideration when the *Way* case was decided, the Washington Supreme Court would hardly have indulged in the dictum quoted. Certainly the remark in its opinion would have been wholly inappropriate and inaccurate as to this action. Here the Appellant bases its recovery upon an express written contract composed of the application and the bonds all signed by the Appellee as inherent parts of a single transaction. In all three documents the legal premium is specified—by exact figures in the application and in the performance bond, and by clear reference to the performance bond, in the payment bond. (Ex. 3) Thus it appears that this written contract upon which Appellant sues has been positively declared valid in respect to the legal premium amount since such written contract has not been modified in the prescribed manner by written insertion of the rebate premium amount. Such being the situation, both in effect and in terms, the statute has pronounced the oral promise upon which Appellee rests its defense to be invalid and unenforceable—that is, void.

Thus, analysis of the *Way* case denies to it the rank of a “controlling” decision (as accorded by the Appellee) by revealing that except superficially it is not even “in point” on the facts in this action under the present Insurance Code of 1947.

The only other decision of the Washington Supreme Court involving insurance cited in Appellee’s brief before the district court is the case of *Kidder v. Hartford Accident & Indemnity Co.*, 126 Wash. 478; 218 Pac. 220. This again is a ruling quite beside the point.

There a widow sued to recover on accident insurance for her husband's sudden death after he had signed with an insurance agent an application embodying the essentials on advice that coverage attached as of that moment, but before the insurance agent had either issued the policy or given notice of a classification change increasing the defendant's premium of which the agent had himself been ignorant. Over dissenting views, a majority of the justices allowed a recovery against the underwriter on the basis of an oral contract of accident insurance which they held was permissible under the former Insurance Code of 1911. The opinion is without argumentative value to the Appellee except only as referring to the *Way* case. The ruling is without authoritative precedent for this court because it involved different parties, different facts, different issues, and different provisions of statute.

Search among the reported decisions of the Washington Supreme Court has failed to find any case in which on similar facts or similar issues it has expressed an authoritative opinion interpreting the pertinent provisions of the Insurance Code of 1947 applicable on this appeal. Therefore, Appellant's further attempt to aid this court is necessarily confined to brief comment about cases decided under the repealed Insurance Code of 1911.

The owner of a promissory note purchased in due course without notice before maturity sued the maker who defended upon the ground that the note was unenforceable because executed in connection with a prohibited rebate of insurance premium. Giving effect to

the negotiable instruments statute and recognizing the plaintiff as an "innocent holder" of commercial paper, the court allowed recovery. In doing so, the opinion said:

"We will assume at the outstart that the note was invalid as between the original parties and subsequent holders with notice, by reason of the violation of the anti-rebate act."

Gray v. Boyle, 55 Wash. 578, 579; 104 Pac. 828.

The plaintiff, being engaged both in loaning money on real estate mortgages and in writing policies of property insurance, sought to enjoin the Insurance Commissioner in his purpose of cancelling its license as an insurance agent because the plaintiff's form of application for mortgage loans authorized the plaintiff to place insurance on the property if the loan were effected. The court finding no premium rebate was actually involved held that the plaintiff was entitled to retain its license. The opinion said:

"Respondent relies largely upon the holdings in the cases of *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595, 49 L.R.A. (N.S.) 147, and *Ferguson-Hendrix Co. v. Fidelity & Dep. Co.*, 79 Wash. 528, 140 Pac. 700. But in those cases we merely held, in accordance with fundamental principles of law, that one cannot avoid his contractual obligations because of his own violation of statutes regulating the conduct of the business under which the contract was made."

Calvin Phillips & Co. v. Fishback, 84 Wash. 124, 128; 146 Pac. 181.

This limiting comment about the *Way* case, *supra*,

would seem to deprive it of support to the Appellee's affirmative defense in this action since the principle declared applies directly to the oral promise for rebate upon which Appellee relies.

The plaintiff, an agent for the New York Life Insurance Company, obtained for the defendant a mortgage loan on his property, it being agreed that the defendant would apply and pay for two policies of insurance on his life from which the plaintiff's commission as insurance agent would compensate him for services in obtaining the mortgage loan. In denying recovery because of the rebate, the court said:

"The appellant further argues that, if the complaint discloses an agreement in violation of the section of the code above noted, even then he is not precluded from recovering, because the law does not declare such contract void. The statute does not, in terms, declare such contracts void, but Rem. Code, Section 6059-180, hereinbefore quoted, clearly prohibits such contracts, and Section 6059-191 provides that any insurance agent knowingly and willfully violating any of the provisions of this article shall be fined in any sum not exceeding five hundred dollars and shall have his license revoked.

"The appellant relies upon the cases of *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595, 49 L.R.A. (N.S.) 147, and *Ferguson-Hendrix Co. v. Fidelity & Deposit Co.*, 79 Wash. 528, 140 Pac. 700. The *Way* case was a case where the appellant sought to recover the difference between the regular rate upon a policy of insurance and the reduced rate. We held in that case he could not recover, because, in substance, he could

not profit by his own wrong. We said in that case, however, that a contract which violates a statutory regulation of business is not void unless made so by the terms of the statute. We were there considering a contract which the agent was seeking to avoid for his own benefit. In the Ferguson-Hendrix case, we held to the same effect. In the latter case, quoting from *Miller v. Ammon*, 145 U.S. 421, we said:

“ ‘The general rule of law is, that a contract made in violation of the statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.

“ ‘We announced the same principle in the recent case of *Stirtan v. Blethen*, 79 Wash. 10 [139 Pac. 618, 51 L.R.A. (N.S.) 623].’

“ ‘The contract made here was in violation of the terms of the statute, and this action is an attempt on the part of the appellant to enforce, in his favor, an illegal contract which he made with the respondents. This he may not do.’

Moser v. Pantages, 96 Wash. 65, 69, 70; 164 Pac. 768.

In an action between two insurance agents involving an agreement to divide their commissions between themselves, the court determined that no rebate was involved and concluded its opinion as follows:

“Rem. Rev. Stat., Section 7077, which prohibits a licensed insurance agent from making any rebate of the premium to the insured, is not applicable to the facts in this case. The purpose of that statute was to establish uniform insurance rates throughout the state and to maintain a standard

of such rates. *Phillips & Co. v. Fishback*, 84 Wash. 124, 146 Pac. 181.

“The case of *Moser v. Pantages*, 96 Wash. 65, 164 Pac. 768, in which it was held that a contract providing for a rebate or remission to the insured was void, has no application here, because, as already seen, there was no such rebate or remission contemplated in the contract now before us, and, in fact, none was made.”

Wolfe v. Philippine Investment Co., 175 Wash. 165, 168; 27 P.(2d) 132.

Since the presently applicable provisions of the Insurance Code of 1947 in the State of Washington have not been the basis for any “controlling” decision by the Supreme Court in that jurisdiction (as already recognized by this court) it is presented with the problem of interpreting the Act as affecting the facts and issues on this appeal.

Jackson v. Flohr, 227 F.(2d) 607, 609, 610 (CA 9-1955).

In this connection, since the Appellee has grounded its affirmative defense so flatly on the *Way* case, *supra*, the attention of this court is directed to an opinion coming from the Court of Appeals for the Fourth Circuit, wherein it refused to be diverted from its own considered conclusion by a mere dictum from the local court.

“Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that ques-

tion in the light of the common law of the state with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise.”

New England Mutual Life Ins. Co. v. Mitchell,
118 F.(2d) 414, 420 (CA4-1941) Cert. denied 86 L.Ed. 505.

In another case where the rights of the parties depended upon an interpretation of state statute, the Court of Appeals for the Sixth Circuit said briefly:

“The statute does not denounce the payment of such premiums as fraudulent in law. It does not define the phrase ‘in fraud of creditors.’ The case of *Lytle v. Baldinger*, 84 Ohio St. 1, 95 N.E. 389, Ann.Cas.1912B, 894, is cited as the nearest approach to an interpretation of the statute by an Ohio court but neither the present issues nor the statute were involved in the *Lytle* case. Nothing said in the *Lytle* case can be construed as an interpretation of the language ‘in fraud of creditors.’

“We are left therefore to our own view of the law * * * ”.

Doethlaff v. Penn Mutual Life Ins. Co., 117 F.(2d) 582, 584 (CA6-1941). Cert. denied 85 L.Ed. 1536.

So in this similar situation now presented this court is left to its own view of the Washington law to be applied as a basis for reversing the District Court.

Unlawful Promise Unauthorized

Next, the Appellant contends that any oral promise by its agent to allow the Appellee a reduction, by calculating the premium for its bonds according to anticipatory rates then unfiled and unapproved, was neither expressly nor apparently authorized by the Appellant which was not bound thereby.

The Appellant so contended in the trial court (R. 84, 85) Based on Specification of Errors No. 1, No. 2, No. 5, No. 7, No. 8, No. 9, and No. 10, the Appellant continues so to contend.

In connection with this contention the Appellant has both admitted and asserted that McCollister & Co., Inc., was its general agent in Seattle, and that John C. Beeson, an officer of that corporation, was an attorney-in-fact empowered to solicit and sign the bonds involved. About these facts there is no dispute. The Appellee has never claimed that the oral promise of a rebate, upon which its sole defense is based, was ever made by anybody except John C. Beeson. (R. 39, 51, 63, 265, 292, 293) About this fact there should be no dispute.

Appellant's proposition has two elements: that of express authority and that of apparent authority.

As to the first element, the record contains no evidence tending to indicate that the Appellant ever by any means conferred either upon the agency corporation or upon Beeson any express authority to make the oral promise with which he has been charged.

As to the second element, the burden of proof lies with the Appellee. It has wholly failed to show that

Beeson had any apparent authority to make any such oral promise. From express power to solicit and sign bonds for the Appellant in a *lawful* manner does not arise implied power to do the same thing in an *unlawful* manner. From power to act for the Appellant legally does not flow power to act for it illegally. Beeson had no apparent authority to violate the law or commit a crime.

On this point Justice Story in writing for the United States Supreme Court was specific more than a century ago.

“The first instruction asked was that there was no evidence in the cause to show that John K. West had any authority from the defendants in the cause, to effect a sale of any property belonging to the estate of their testatrix, in Louisiana, except in conformity with the laws of the said State; and that unless the plaintiff shows a sale to the plaintiff (Hull) by West, in conformity with the said laws, and a subsequent recovery from Hull, he is not entitled to recover. We are of opinion that this instruction ought to have been given as prayed.

“Every authority given to an agent or attorney to transact business for his principal must, in the absence of any counter proofs, be construed to be, to transact it according to the laws of the place where it is to be done. A sale of slaves, authorized by an executrix to be made in Louisiana, must be presumed to be intended to be made in the manner required by the laws of that State to give it validity. And the purchaser, equally with the seller, is bound under such circumstances to know what these laws are, and to be governed thereby. The

law will never presume that parties intend to violate its precepts; * * *

Owings v. Hull, 34 Peters (US) 607; 9 L.Ed. 246, 253.

In an action to recover upon a guardianship bond written by an agent (without any statutory violation) whose apparent authority to bind the surety was disputed, the Washington Supreme Court by an opinion rendered earlier this year said:

“In any event, an agent cannot enlarge his actual authority by his own assertions or representations. In an action against the principal, such as the instant case, the only competent evidence of an agent’s apparent authority is that which is founded on some act or representation of the alleged principal.”

Charette v. American Etc. Co., 49 Wn.(2d) 777, 780; 307 P.(2d) 252.

Upon this question of apparent authority the Washington Supreme Court decided another case involving a situation so similar that the opinion is quoted in full—the only noteworthy distinction being that there the principal on the contractor’s bond knew he was dealing with the surety’s local agent of authority limited by the principal while here the Appellee was bound to know that Beeson’s authority was restricted by regulatory prohibitions of law. The court’s opinion said:

“The plaintiff surety company seeks recovery of a balance claimed to be due it for premium upon a surety bond executed by it as surety for the defendant, Lind, to secure performance of a road construction contract entered into by him with the United States. A trial in the superior court

for Whatcom County, sitting with a jury, resulted in a verdict and a judgment rendered thereon denying any recovery to the surety company, from which it has appealed to this court.

“At the conclusion of the introduction of the evidence, counsel for the surety company timely moved the court to instruct the jury to render a verdict in its favor for the sum of \$1,395 and interest; and, after the return of the verdict, timely moved the court to render a judgment in its favor for that amount notwithstanding the verdict. The conceded and uncontroverted facts, the latter appearing almost wholly from Lind’s own testimony, controlling of the question of the surety company being entitled to such judgment as a matter of law, may be summarized as follows:

“In October, 1921, Lind tendered to the bureau of public roads of the agricultural department of the United States bids for the construction of a section of the so-called McKenzie River road in Oregon, and was by that bureau awarded a contract accordingly. The total contract price was \$186,000. It was a condition of the specifications and the contract to be formally entered into, that Lind should furnish a bond with surety in a penal sum equal to one-half of the total contract price, securing the performance of the contract. The contract was accordingly formally entered into between Lind and the United States, he furnishing a bond as required, executed by himself as principal and the surety company as surety in the penal sum of \$93,000. Lind was then a resident of Bellingham in Whatcom county, in this state. R. L. Kline was then the local agent at Bellingham of the surety company, but without authority to write or execute a bond of this nature for this amount. His

only authority was to take written applications for such bonds upon blank forms furnished by the company to be signed by the applicant and then forwarded to the general manager and resident vice president of the surety company at Seattle for acceptance or rejection by him, and the execution of the bond by him as surety for the company, if the application be accepted.

“Lind was well aware of this limited agency power on the part of Kline. He claims to have entered into an oral contract with Kline, the local agent, by which he was to pay premium to the company for its execution of the bond as surety, equal to one and one-half per cent of the amount of the bond; that, one and one-half per cent of \$93,000, making \$1,395; while the surety company claims that Kline did not have any authority to enter into any such contract and did not assume to enter into any such contract, but that Lind, by making application for and by accepting the bond, impliedly agreed to pay the uniform regularly established premium rate therefor, which was then one and one-half per cent upon the total price of the contract for the performance of which the bond was given to secure; that is, one and one-half per cent of \$186,000, making \$2,790; one-half of which, it is conceded, Lind has paid to the surety company. “Lind testified in substance that, at the time of the signing of the application and delivering it to Kline, he, Kline, agreed that the premium to be paid this surety company for the execution of the bond would be one and one-half per cent upon the amount of the bond, that is, \$1,395. It is further shown beyond question, and not disputed in any way, that the regularly established premium rate upon such a bond is one and one-half per cent

upon the total price of the contract for the performance of which the bond is given to secure. Lind also testified that, when he made application to Kline for the bond, he signed the application without any of the blank spaces being filled in, with the understanding that Kline would fill them in with the proper data, and that this was afterwards done either by Kline or by someone at the general agency in Seattle.

“The evidence is in serious conflict as to Kline assuming the making of a contract with Lind that the premium would be one and one-half per cent of the amount of the bond, and also as to the application being signed by Lind before the filling of the blanks therein. We, however, adopt Lind’s version of these facts in view of the finding of the jury. The application upon its face shows an express promise of Lind to pay the premium upon the bond in the sum of \$2,790, that being one and one-half per cent of the contract price. The application was by Kline forwarded to the general manager and resident vice president at Seattle; and, in compliance with the data and information appearing thereon, after the filling of the blanks, the bond was executed by the surety company as surety and by Lind as principal and delivered to the proper authorities of the United States, as provided by the construction contract theretofore signed. The body of the bond does not seem to show the amount of the premium charged by the surety company.

“A short time after the execution of the bond, the surety company presented to Lind a bill for the premium, claiming \$2,790 due thereon. This, Lind insists, was the first intimation he had of the surety company claiming premium computed upon

the contract price instead of upon the amount of the bond. Thereafter Lind paid the surety company \$1,395; and refusing to pay more, this action was commenced by the surety company, seeking recovery of the balance of \$1,395 claimed by it to be due. It is not claimed that the general manager and resident vice president or anyone connected with the surety company, other than the local agent, Kline, had ever intimated to Lind that the premium would be at other than the uniform regularly established rate; nor that anyone connected with the surety company, other than Kline, had any knowledge of the attempted making of the claimed premium rate contract between Lind and Kline, until after the execution and delivery of the bond.

“In view of the very limited, apparent as well as actual, authority of Kline as agent of the surety company, it seems to us that it must be held, as a matter of law, that any attempted contract between Lind and Kline, as agent of the surety company, looking to the fixing of the amount of premium upon the bond at one-half of such uniform regularly established rate was wholly without binding force upon the surety company. There is not only the slightest affirmative showing of authority given by the surety company to Kline to make for it any such contract, but the legal presumptions are overwhelmingly against it. The provisions of our insurance code here applicable provide for the establishment of uniform regular premium rates and the filing of schedules thereof in the office of the state insurance commissioner, and also provide for penalties for the failure to observe such uniform rates in making charges for premiums. Sections 7076, 7077, 7118, 7147, Rem.

Comp. Stat. [P.C. Secs. 2939, 2940, 2980, 3009] The surety company complied with these provisions by duly filing its schedule of rates with the insurance commissioner, to be computed, as here claimed by it, upon bonds of this nature, as here shown by a duly certified copy of its schedule of rates so filed with the insurance commissioner.

“We are not here concerned with any claimed special premium rate contract entered into between Lind and the general manager and resident vice president of the surety company. Whether such a special contract rate with the general manager and resident vice president could be enforced by Lind as against the surety company, we need not here inquire. It is sufficient for present purposes for us to say that we are of the opinion that the attempted special premium rate contract between Lind and Kline, the local agent assuming to act for the company, was wholly without the agency authority of Kline, and that Lind must be held, as a matter of law, to have known that Kline had no authority to make any such a contract. It follows, as a matter of law, that the surety company is entitled to premium for the issuance of the bond computed at the established uniform regular rate of one and one-half per cent upon the total contract price, that is, \$2,790, less the \$1,395 already paid.

“The judgment of the superior court is reversed, and the cause remanded with directions to award to the surety company a judgment in the sum of \$1,395, with interest, notwithstanding the verdict, in harmony with the conclusion we here reach.”

American Surety Co. v. Lind, 132 Wash. 326;
232 Pac. 280.

The record in the present action is empty of evidence upon which reasonably to conclude that the Appellant itself either by knowledge or by act had clothed Beeson with the appearance of authority to promise the Appellee a premium rebate.

If for no other reason, the lower court should have directed a verdict in favor of the Appellant or have granted its motion to upset the judgment based thereon, merely because Beeson's oral promise was utterly unauthorized.

Account Stated

Finally, the Appellant contends that with some undisputed evidence and by the admissions of Appellee in the pretrial order, the record shows an "account stated" on which Appellant was entitled to a judgment of recovery.

The Appellant so contended in the trial court. (R. 63, 84) Based on Specification of Errors No. 1, No. 2, and No. 11, the Appellant continues so to contend.

Always consistent with the written contract composed of the signed application and the signed bonds which specified the sum of \$47,753.72 as the premium, invoices for that amount were issued to the Appellant through the joint venture of which it was a member. No bills demanding payment were ever issued except for that same total amount or for balances due thereon after allowance of credits for part payment. (Ex. 4)

The bonds became fully effective as an obligation of both the Appellee and the Appellant when accepted by the United States Engineers on the 17th of June 1955.

(R. 57, 58) Monthly thereafter Appellant's bills were sent in July, August, September, October, November and December of 1955. Partial payments were made in September and October of 1955. Each was *exactly* 25% of the total. Hence, half of the total was paid without protest. The pretrial order as "admitted facts" recited:

"That statements of account in the amount of \$47,-753.72 were submitted to Islands Construction Co. as manager of the joint venture on account of the premium charged under dates of July 1, 1955, August 1, 1955, September 1, 1955, October 1, 1955, November 1, 1955, and December 1, 1955. That the joint venture without protest paid on said account under date of September 19, 1955, the sum of \$11,938.43 and a like sum was similarly paid on account under date of October 21, 1955 which payments were properly credited." (R. 57, 58)

Despite some qualifying or contradicting testimony at the trial from witnesses for Appellee, it is bound by these formal deliberate pretrial admissions.

CONCLUSION

In preliminary paragraphs of the Insurance Code, the Washington Legislature declared as follows:

"Sec. .01.02 Scope of Code: All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code."

"Sec. .01.03 Public Interest: The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and

equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance." (Laws 1947, Chapter 79)

The Washington Legislature in the same enactment by Sec. .30.17 pointedly directed a prohibition against the Appellee by providing that: "*No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof.*"

In this litigation the Appellee by urging its sole defense is asking affirmative aid of the courts to violate the express letter and the worthy purpose of the insurance law in the State of Washington. For this reason the Appellant has more than a selfish interest in this court's reversal of the District Court's judgment.

Respectfully submitted,

LANE SUMMERS

THEODORE A. LEGROS

Attorneys for Appellant.

APPENDIX — EXHIBITS

Rule 18-2(f)

<i>Exhibit Number</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
1.	R105	R107	R218
2.	R109	R109	R109
3.	R110	R111	R111
4.	R124	R123, 125, 126	R126
5.	R137	R137	R137
6.	R139	R139	R139
7.*	R146	R147	*
	R148	R149	R149
8.	R150	R151	R151
9.	R154	R288	R288
10.	R169	R169	R169
11.	R178	R178	R179
12.	R184	R184	R184
13.	R224	R224	R224
14.**	R254	R254	R254
15.	R320	R323	R324
A-1	R129	R130	R130
A-2	R239	R245	R245
A-3	R244	R244	R244
A-4	R261	R262	R262

*Typewritten copies substituted for photostats (R148)

**Withdrawn from record by stipulation of counsel.

United States Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation, *Appellant*,

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

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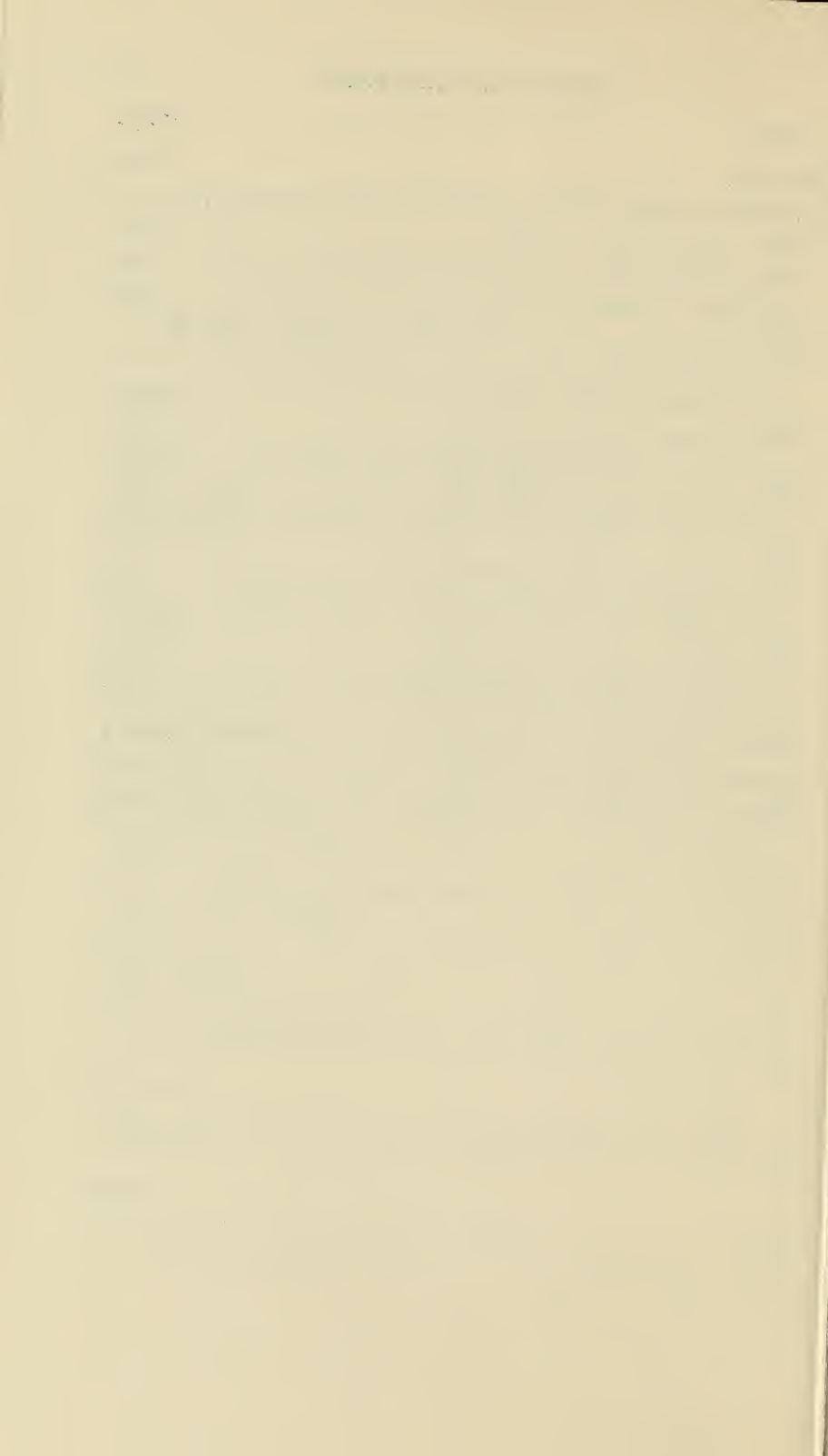
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United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,	<i>Appellant,</i>	} No. 15681
vs.		
ANDERSON CONSTRUCTION CO., INC., a corporation,	<i>Appellee.</i>	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

JURISDICTION

The statement of jurisdiction which is set forth in Appellant's brief is correct.

STATEMENT OF THE CASE

Most of the assertions of fact in the statement of the case which is set forth in the Appellant's brief are correct in themselves. The assertion therein on p. 4 that "Appellee's sole defense is an unlawful oral agreement for a reduced premium in violation of an express statute" is, however, a reiteration of an erroneous conclusion that was overruled by the trial court and that is directly contrary to the construction of the statute by the Supreme Court of Washington. For a proper understanding of the valid agreement concerning the premium to be paid by Appellee for the issuance of these bonds by Appellant, some additional facts should be

mentioned. These facts were substantially undisputed and were the basis of the verdict of the jury, and they compel the conclusion that the premium agreement between the parties was in all respects proper and fair, and in no sense an illegal rebate agreement, as denominated by Appellant.

In April or May, 1955, Appellee and Islands Construction Co. and Montin-Benson Corp., all engaged in the construction business, formed a joint venture to bid upon a contract with the United States for certain construction work for the Air Force in Alaska (R. 103-4, 133-4). It was necessary for the joint venture to accompany its bid with a surety company's bid bond running to the United States. If it won the award the joint venture would also be required to furnish a surety company's performance bond and payment bond running to the United States (R. 175, 294-5).

Over many years Martin Anderson, president of Appellee, had obtained many similar surety bonds through John C. Beeson of McCollister & Co. Over many years Mr. Beeson had also written almost all the surety bonding requirements of Loren Baldwin, president of Islands Construction Co. (R. 264, 293-4). Accordingly, Mr. Anderson and Mr. Baldwin both went in May, 1955, to see Mr. Beeson about surety bonds for the contemplated bid by their joint venture (R. 265, 292-3, 297).

McCollister & Co. was and for many years had been a general agent of the Appellant surety company. It had authority to appoint sub-agents for Appellant, and it acted both as a "wholesaler" and as a "retailer" of Appellant's surety bonds (R. 220). When McCollister

& Co. sold the Appellant's bonds, premium payments were always made to McCollister (R. 208). In its territory, McCollister & Co. was recognized as "Mr. U. S. F. & G." (Appellant) (R. 200).

In May, 1955, Mr. Beeson was vice-president and a shareholder of McCollister & Co. He was and had been for some years an attorney-in-fact for Appellant, executing its surety bonds and affixing to them its corporate seal. Mr. Beeson had been with McCollister & Co. for 22 years. He devoted his time to the surety bond business and was McCollister's specialist in the field (R. 199). He had time and again executed surety bonds for both Mr. Anderson and Mr. Baldwin. When they had problems in connection with bonds or bond applications at McCollister & Co., they understood that Mr. Beeson was the man with whom to deal. As far as they were concerned, in connection with bonds, Mr. Beeson was McCollister & Co. (R. 173, 198-200, 293-4).

When Mr. Anderson and Mr. Baldwin conferred with him in May, 1955, Mr. Beeson could have supplied acceptable surety bonds for their joint venture either from a so-called "board" surety company of which Appellant was one, or from a "non-board" company which he also represented (R. 197-8, 206, 224). The "board" companies were those for which premium rate schedules were filed as a group with the Insurance Commissioner of Washington by a single rating "board" or "bureau" (R. 177-8).

At this time the premium rates on surety bonds issued by "non-board" companies were 25 per cent lower than the rates on surety bonds of the same kind

and amount issued by "board" companies like Appellant (R. 205-6). As a result the "non-board" companies had obtained a much larger percentage of the surety bond business in Washington than elsewhere (R. 225). Appellant and other "board" companies were unhappy about this and for some time had been looking forward to a reduction of their Washington rates to the "non-board" level (R. 236). Mr. Beeson knew that Appellant and other "board" companies were preparing this rate reduction (R. 182, 205-7, 266, 297).

In the past Mr. Beeson had supplied Mr. Anderson and Mr. Baldwin with "non-board" surety bonds (R. 197-8, 206, 266) which they knew were cheaper than "board" company bonds (R. 266, 297). When they told Mr. Beeson that they wanted the lowest possible bond cost Mr. Beeson assured them that Appellant was shortly going to reduce its rates to the "non-board" level and that, if they let him supply Appellant's bonds, they would get the benefit of this reduced premium rate (R. 205-8, 265-70, 297-300).

It was part of the expected function of Mr. Beeson and McCollister & Co. to choose the proper bonding company (R. 325-6). At no time did Mr. Beeson ever tell Mr. Anderson or Mr. Baldwin, nor did they know, that the Insurance Commissioner of Washington had anything to do with surety bond premium rates (R. 264-5, 294). The computation of the premium for the joint venture's bonds required the use of rate schedules found in a large volume which Mr. Beeson and other insurance specialists had in their possession but which Mr. Anderson and Mr. Baldwin did not. Computation of

rates depended upon allocation of the work involved to one of four possible classifications, with adjustments for the amount of the contract and the period for its performance; all matters requiring skill and familiarity with the rate manual (R. 201-3).

Were it not for Mr. Beeson's assurance that the premium for a U.S.F. & G. bond would be no higher than the "non-board" bond, Appellee would have purchased the cheaper "non-board" bonds (R. 271, 300). Relying upon Mr. Beeson's assurance, Mr. Anderson signed Appellant's application form on behalf of Appellee (R. 296). This was a single form of application for all three of the bonds—bid, performance and payment—required on the government contract. If the bid were unsuccessful, the Appellant would charge the joint venture a premium of \$5.00 for the bid bond. If the bid were successful, the Appellant would credit the bid bond premium against the multi-thousand dollar premium to be charged for the performance and payment bonds. But the computation of the premium for the performance and payment bonds depended upon the amount and duration of the construction contract, which were unknown at the time the single application form was signed. Consequently, and in accordance with custom, *the application was signed with the space for the amount of the premium left blank*, to be filled in later by Mr. Beeson. Thereafter, without Appellee's knowledge and without authorization from Appellee, someone cause the figure "\$47,753.72" to be inserted in this blank, in violation of Mr. Beeson's promise (R. 194-7, 200-1, 295-6). This figure was the premium for

Appellant's performance and payment bonds, if computed on the basis of the "board" company rates in effect in May, 1955, and before the reduction made in July, 1955 (R. 191). This premium figure was based on a two-year period of contract performance (R. 307). On the basis of this premium, the agency commission would be about \$8,000. (R. 239-40).

The joint venture was successful in its bid on the Air Force contract and about the middle of June, 1955, Appellant as surety executed separate performance and payment bonds for each member of the joint venture, and delivered the bonds to the respective members for their execution as principals. The back of the performance bond contained a recital that the total premium was \$47,753.72. The members of the joint venture signed their respective performance bonds on the face side only, and the manager of the joint venture then delivered all the bonds to the United States (Par. VI of Admitted Facts, R. 57, 116).

Under date of July 1, 1955, McCollister & Co. sent to the manager of the joint venture a statement showing a total bond premium owing of \$47,753.72 (Par. VIII of Admitted Facts, R. 57).

On July 5, 1955, a schedule reducing the premium rates of Appellant and other "board" companies by about 25 per cent was filed, for effect after July 20, 1955. Computed under these new rates the total premium for the joint venture performance and payment bonds was \$35,576.79 (Par. XI of Admitted Facts, R. 58-9). On the basis of this premium, the agency commission would be about \$6,000 (R. 239-40).

Appellee first learned of the amount of the reduction in late July or August, 1955 (R. 303-4). Under dates of August 1 and September 1, 1955, McCollister & Co. continued to send out statements showing a premium owing of \$47,753.72, computed under the pre-July "board" rate (Par. VIII of Admitted Facts, R. 57).

During September, 1955, both Mr. Anderson and Mr. Baldwin began to protest to Mr. Beeson the billing under the pre-July "board" rate (R. 275, 302-3). On September 15, 1957, Mr. Baldwin's office received a letter from McCollister & Co. reminding it that the statement of September 1 showed an amount due of \$35,815.29 and asserting that this should be paid in three installments of one-third each (R. 129-30). On September 19, 1955, the joint venture paid \$11,938.42 on account without protest (Par. VIII of Admitted Facts, R. 57).

In sixteen years of prior dealings McCollister & Co. had never refused to discuss bond premium adjustments with Mr. Anderson or Mr. Baldwin on the ground that the protests were not timely (R. 271). Mr. Anderson and Mr. Baldwin discussed an adjustment of this current bond premium with Mr. Beeson several times from October to December, 1955, and were told that Mr. Beeson was working on it. They understood that they would pay in accordance with their original agreement for the reduced rate, and relied on this understanding in making the payments on account. Meanwhile they paid another \$11,938.43 on account in October, 1955. But McCollister & Co. kept sending out

statements on November and December 1 based on the pre-July "board" rate (R. 212-14, 270-6, 302-6, and Par. VIII of Admitted Facts, R. 57). And finally Mr. Friday, president of McCollister & Co., asserted that adjustment was impossible because of the Appellant's alleged reinsurance commitment on the basis of the pre-July "board" premium rate R. 230-1, 272-3).

Having rejected a tender of the balance of the premium due under the terms of the oral contract, Appellant brought suit against Appellee alone on the latter's alleged written several engagement to pay a premium of \$47,753.72 (Par. V of Complaint, R. 4). Appellee's answer set forth as an affirmative defense that the amount of the premium was a blank at the time of the signing of the application (Exhibit A to Complaint) and that the same was agreed to be filled with a figure calculated upon the basis of reduced rates then contemplated by Appellant (R. 18-19). The tender of the admitted balance due Appellant on this basis was kept good by payment into court (Par. XII of Admitted Facts, R. 59). Appellant's reply denied the agreement pleaded in the answer and alleged that the same would be illegal under the Insurance Code (R. 28-33). The jury found that the agreement had been made and the trial court held that it was not void as between the parties under Washington law.

ARGUMENT

1. The premium agreement is valid

A. The "rebate" sections of the Insurance Code apply only to premiums on insurance "policies," and have no application to premiums on surety bonds

Appellant concedes that the jury necessarily found that its agent John C. Beeson orally promised Appellee that the premium for Appellant's surety bonds would be based on the reduced rates which were soon to go into effect, and which did in fact go into effect within about a month of the delivery of the bonds.

Appellant contends that this agreement is made void by the Insurance Code of 1947. While Appellant on pp. 8-9 of its brief quotes three "rate filing" sections of the Code (.19.04, .19.05, .19.28), its argument rests chiefly on the alleged applicability here of the "rebate" provisions in Section .30.14 and especially in Section .30.17 of the Code. Thus Appellant on p. 8 of its brief calls the premium agreement here an illegal "rebate," and on p. 11 of its brief says that "Appellee is asking the court to aid it in violating Section .30.17 of the Insurance Code which prohibits the Appellee from receiving or accepting, 'directly or indirectly, any rebate of premium'."

Initially we maintain that the oral premium agreement is valid and that these "rebate" provisions simply do not apply to surety bond premiums at all. These provisions purport only to prohibit the giving and receiving of "rebates" of premiums on insurance "*policies*." Surety insurance contracts and surety bonds

are not "policies" either in common usage in the business world or in the Insurance Code. This becomes clear when the "rebate" provisions of the Code are examined in the context of the following pertinent provisions taken from the Insurance Code of 1947, L. 1947, c. 79 (emphasis is added in text and R.C.W. reference is given at end of each section quoted).

The Code defines the term "policy" and requires that a "policy" contain a statement of the premium, but expressly excludes "surety insurance contracts" from this requirement:

"Sec. .18.14 *Content of Policies in General*: 1. The written instrument, in which a contract of insurance is set forth, is the *policy*.

"2. A *policy* shall specify:

"(1) The names of the parties to the contract. The insurer's name and type of organization shall be clearly shown in the policy.

"(2) The subject of the insurance.

"(3) The risks insured against.

"(4) The time at which the insurance thereunder takes effect and the period during which the insurance is to continue.

"(5) *A statement of the premium, other than as to surety bonds*, and if other than life, disability, or title insurance, the premium rate.

"(6) The conditions pertaining to the insurance.

"3. If under the contract the exact amount of premiums is determinable only at termination of the contract, a statement of the basis and rates upon which the final premium is to be determined

and paid shall be furnished any policy examining bureau having jurisdiction or to the insured upon request.

“4. *This section shall not apply to surety insurance contracts.*” R.C.W. 48.18.140.

With respect to “policies,” the Code provides:

“Sec. .18.18 *Stated Premium Must Include All Charges*: 1. The premium stated in the *policy* shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.

“2. No insurer or its officer, employee, agent, solicitor, or other representative shall charge or receive any fee, compensation, or consideration for insurance which is not included in the premium specified in the *policy*.

“3. Each violation of this section is a gross misdemeanor.” R.C.W. 48.18.180.

“Sec. .18.19 *Must Contain Entire Contract*: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the *policy*.” R.C.W. 48.18.190.

The provisions do not apply to surety bond premiums, which are not required to be stated in the surety insurance contract; and they do not apply to a surety contract of insurance, which is not required to be contained in a “policy.” Appellant errs on p. 27 of its brief when it seeks to make these provisions apply in the instant case by assuming that “As necessarily interpreted in the application of the Insurance Code to the surety business,” the word “policy” in the statute means “surety bond.”

The inapplicability of the term "policy" in the Insurance Code to surety bonds is further borne out by the Code requirements that the application be made part of the "policy":

"Sec. .18.08 *Application as Evidence* : 1. No *application* for the issuance of any insurance *policy* or contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of the *application* was attached to or otherwise made a part of the *policy* when issued and delivered. This provision shall not apply to policies or contracts of industrial life insurance. * * *." R.C.W. 48.18.080.

"Sec. .18.52 *Construction of Policies*: Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the *policy*, and as amplified, extended, or modified by any rider, endorsement, or *application* attached to and made a part of the *policy*." R.C.W. 48.18.520.

The attaching of the application to the "policy" is customary with life and other kinds of insurance, but it would be wholly inappropriate to attach a construction company's bond application to the surety bond itself for delivery to the contract obligee. Yet if the term "policy" means "surety bond," as Appellant contends, these statutes would require this, and would bar Appellant's action here because Appellee's application was not attached to the "policy" [bond] delivered to the United States.

The "rebate" provisions are addressed to the giving and receiving of "rebates" of premiums on "policies";

“Sec. .30.14 *Rebates*: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the *policy*.

* * *

“3. This section shall not apply to the allowance by any marine insurer, or marine insurance agent, general agent, broker, or solicitor, to any insured, in connection with marine insurance, of such discount as is sanctioned by custom among marine insurers as being additional to the agent’s or broker’s commission.” R.C.W. 48.30.140.

“Sec. .30.16 *License Revocation for Rebates*: The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker, or solicitor guilty of violating any provision contained in sections .30.14 and .30.15. No such insurer, general agent, agent, broker, or solicitor shall, following any such revocation, be eligible for a certificate of authority or license within one (1) year after such revocation.” R.C.W. 48.30.160.

“Sec. .30.17 *Receiving Rebate*: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or

any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the *policy*, or any commission on any insurance *policy* to which he is not lawfully entitled as a licensed agent, broker, or solicitor. The retention by the nominal policyholder in any group life insurance contract of any part of any dividend or reduction of premium thereon contrary to the provisions of section .24.26, shall be deemed the acceptance and receipt of a rebate and shall be punishable as provided by this code.

“2. The amount of insurance whereon the insured has so received or accepted any such rebate or any such commission, other than as to life or disability insurances, shall be reduced in the proportion that the amount or value of the rebate or commission bears to the premium for such insurance. In addition to such reduction of insurance, if any, any such insured shall be liable to a fine of not more than two hundred dollars (\$200).”
R.C.W. 48.30.170.

That these “rebate” provisions do not apply to discounts or reductions of premiums on surety bonds is borne out also by the very contents of these provisions. “Rebate” Sec. .30.14-3, quoted above, expressly exempts discounts on marine insurance. Marine insurance contracts are normally contained in “policies” and, but for the express exemption, such discounts would be prohibited. But surety contracts are not contained in “policies” and hence are exempted from the provision by definition alone.

Similarly, “rebate” Sec. .30.17-2, quoted above, pro-

vides two different penalties against a person who has received "any such rebate", *i.e.*, a rebate not specified his "policy". These penalties are a fine and a reduction of the amount of insurance. If the word "policy" meant "surety bond," as Appellant argues, it would follow that, under the terms of the statute, one of the penalties for Appellee's receiving a premium reduction would be the reduction of Appellant's bond running to the United States. Whereupon Appellant states on p. 26 of its brief that "For patent reasons" the Insurance Code does not attempt to impose this penalty in the case of surety bonds. But the difficulty which Appellant has to explain away arises only because Appellant seeks to make "policy" mean "surety bond." This difficulty vanishes and the statute is left wholly consistent and operative when it is recognized that a "surety bond" is not a "policy" and that the statute does not purport to deal with surety bond premiums. This is made clear by the fact that the insurance reduction penalty provided in the statute would apply to life and disability insurance, which is evidenced by a "policy," were it not for the express exclusion of such penalty for these types of insurance. No exemption is needed for surety bonds, however, because they do not involve a "policy."

Since the "rebate" provisions of the Insurance Code have no application at all to surety bond premiums, the agreement between Appellant and Appellee for the bond premium at the reduced rate shortly thereafter made effective is a completely valid contract which is left wholly untouched by the Insurance Code.

B. Even where the Insurance Code has some application to surety bond premiums, the agreement here is valid under the *Way* case

Even if the “rebate” sections quoted above should be held applicable to the agreement here to compute a surety bond premium on the basis of an anticipated reduction of rates, the sole effect of the sections is to subject the giver and the recipient of the reduction to the express statutory penalties — revocation of the license of the giver, under Sec. .30.16 (quoted above at p. 13), and a fine of \$200 for the recipient, under Sec. .30.17 (quoted above at pp. 13-14). Moreover, the “rate filing” Sections .19.04, .19.05 and .19.28, quoted on pp. 8-9 of Appellant’s brief apply only to the insurer, and not to the insured, and the sole effect of these sections upon a deviation from the filed rate is to subject the insurer to a fine of up to \$500, under Sec. 19.43 (R.C.W. 48.19.430). Since these are the only penalties specified for the violation of the “rebate” and “rate filing” sections (the reduction of insurance being inappropriate in the case of surety bonds), the statutes do not invalidate an agreement for a premium at an anticipated reduced rate.

This has been conclusively established in Washington by the controlling case of *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595 (1913). In that case, as here, plaintiff agreed to provide insurance (there apparently property insurance) at a premium rate less than the “board” rate. Subsequently, as here, the plaintiff sought to recover the difference between the agreed amount paid and the higher amount com-

puted under the scheduled rate upon the theory that the contract for the payment of the lesser amount was illegal and void under the Insurance Code of 1911. The Supreme Court of Washington, in a unanimous decision, sustained a judgment for the defendant. The court, in disposing of the contention of the plaintiff here, used language which is apposite to the instant situation (74 Wash. 333-4) :

“We are invited by defendant to discuss the constitutionality of the act of 1911 in so far as it gives to insurance companies and other outside agencies the right to fix rates that are binding upon the state and its citizens, but we think it unnecessary to go into this phase of the case; for, as we view it, plaintiff cannot recover upon general grounds. The contract was made and executed. Plaintiff can only recover upon a contract, express or implied. That he cannot recover upon an express contract goes without saying, for the amount agreed to be paid for the policies has been paid. There is no implied contract unless it is in virtue of § 33 of the insurance code. This section is designed to prevent rebating. It penalizes a company, agent, solicitors, or broker by revoking its or his license, and the property owner by reducing the insurance in such proportion as the amount of the rebate bears to the total premium, and by making him liable to pay a fine ‘of not more than two hundred dollars.’

“Plaintiff’s error lies in the assumption that the contract between the copartnership and the defendant was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act.

“‘It is a general proposition, sustained by the

weight of authority, that where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so fixed is exclusive of any other.' *LaFrance Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827.

"See, also, *Horrell v. California, Oregon & Washington Homebuilders' Ass'n*, 40 Wash. 531, 82 Pac. 889. The statute strikes no blow at the business of insurance, neither does it assume to void contracts. Its purpose is to regulate, not to prohibit.

" 'When a statute is . . . a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid.' Sutherland, *Statutory Construction*, §336.

" 'The distinction between a valid contract but one subjecting the contracting parties to penalties and one made in contravention of a positive statute, or one declaring a public policy, will be illustrated by comparing the cases we have just cited with the case of *Carstens Packing Co. v. Southern Pac. R. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L.R.A. (N.S.) 975.' "

The *Way* case makes irrelevant all the cases cited by Appellant on pp. 12-22 of its brief for the proposition that, as Appellant states on p. 12 of its brief, "an agreement violating an express statute is usually void."

The *Way* case is not a sporadic or isolated expression on the point. On the contrary, it has never been criticized, but has been cited repeatedly with approval on the point in subsequent opinions. *Ferguson-Hen-*

drix Co. v. Fidelity and Deposit Co., 79 Wash. 528, 532, 140 Pac. 700 (1914); *Lane v. Henry*, 80 Wash. 172, 174, 141 Pac. 365 (1914); *Kidder v. Hartford Accident & Indemnity Co.*, 126 Wash. 478, 480, 482, 218 Pac. 220 (1923) (holding an oral contract for accident insurance valid although the Insurance Code of 1911 required the “policy” to contain the entire contract); *Yakima Lodge v. Schneider*, 173 Wash. 639, 643, 24 P.2d 103 (1933); *Fisher v. Thumlert*, 194 Wash. 70, 74, 76 P.2d 1018 (1938).

The Appellee submits that the only significant factual difference between the *Way* case and the instant case militates in favor of Appellee. In the *Way* case, for all that appears in the opinion, the plaintiff had promised to the defendants a reduced rate not available to anyone else, *i.e.*, a solitary discriminatory discount. Here, however, the Appellant promised to the Appellee a reduced rate that was then available from Appellant’s competitors, and which Appellant was then planning to adopt and which it did adopt shortly thereafter.

Appellant’s first attempt to avoid the Way case.

In the District Court the Appellant sought to avoid the effect of the *Way* case by pointing out that the “rebate” provisions in Section 33 of the Insurance Code of 1911, which were considered in the *Way* case, were repealed by the new codification of the Insurance Code in 1947. On pp. 9-11 of its brief here, Appellant relies upon the “rebate” provisions in Sections .30.14 and .30.17 of the Insurance Code of 1947, quoted above, and on p. 29 of its brief the Appellant refers to “the repealed Insurance Code of 1911.”

Both the "filing" and the "rebate" provisions of the two Codes are substantially identical. (For 1911 Code predecessor of 1947 Code "filing" provisions quoted by Appellant on pp. 8-9 of its brief, *cf.* L. 1911, c. 49, §§73, 74, pp. 209-10).

For the convenience of the Court, we reproduce in parallel columns the provisions, so far as applicable to this discussion, of Section 33 of the Insurance Code of 1911 and the corresponding provisions of the 1947 Code which Appellant asserts repealed the earlier provisions:

Code of 1911

(L. 1911, c. 49, p. 195-6)

Code of 1947

(L. 1947, c. 79, p. 481-3)

"Sec. 33. *Rebates Prohibited.* No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for in-

"Sec. 30.14. *Rebates.* 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, divi-

Code of 1911

(L. 1911, c. 49, p. 195-6)
(Continued from page 20)

surance, on any risk in this state now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, agent, solicitor, or broker, personally or otherwise, offer, promise, give, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy.

“The license of any insurance company, agent, solicitor, or broker who violates the provisions of this section shall be revoked and no license shall be issued to such company, agent, solicitor, or broker within one year from the date of the revocation of the license.

Code of 1947

(L. 1947, c. 79, p. 481-3)
(Continued from page 20)

dends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.” R.C.W. 48.30-.140.

* * *

“Sec. .30.16. *License Revocation for Rebates*: The Commissioner shall revoke the certificates of authority or licenses of any insurer, general agent, agent, broker, or solicitor guilty of violating any provision contained in sections .30.14 and .30.15. No such insurer, general agent, agent, broker, or solicitor shall, following any

Code of 1911

(L. 1911, c. 49, p. 195-6)
(Continued from page 21)

“No insured person or party shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or agent’s, solicitor’s, or broker’s commission thereon payable on the policy, or on any policy of insurance, or any favor or advantage or share in the dividend or other benefits to accrue thereon, or any valuable consideration or inducement, not specified in the policy contract of insurance;

Code of 1947

(L. 1947, c. 79, p. 481-3)
(Continued from page 21)

such revocation, be eligible for a certificate of authority or license within one (1) year after such revocation.” R.C.W. 48-30.160.

“Sec. .30.17. *Receiving Rebate*: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. The retention by the nominal policyholder in any group life insurance contract of any part of any dividend or reduction of premium thereon contrary to the provisions of section .24.26, shall be deemed the acceptance and receipt of a rebate and shall be punishable as provided by this code.

Code of 1911

(L. 1911, c. 49, p. 195-6)
(Continued from page 22)

“the amount of the insurance whereon the insured has received or accepted, either directly or indirectly, any rebate of the premium or agent’s, solicitor’s, or broker’s commission thereon, shall be reduced in such proportion as the amount or value of such rebate, commission, dividend, or other consideration so received by the insured, bears to the total premium on such policy, and any such insured shall be liable, in addition to having the insurance reduced, to a fine of not more than two hundred dollars.

* * * .”

Code of 1947

(L. 1947, c. 79, p. 481-3)
(Continued from page 22)

“2. The amount of insurance whereon the insured has so received or accepted any such rebate or any such commission, other than as to life or disability insurances, shall be reduced in the proportion that the amount or value of the rebate or commission bears to the premium for such insurance. In addition to such reduction of insurance, if any, any such insured shall be liable to a fine of not more than two hundred dollars (\$200).”
R.C.W. 48.30.170.

It is apparent from a comparison of these “rebate” provisions of the Codes of 1911 and 1947 that the new codification incorporated the language of the old and did not alter in substance the pre-existing law upon the point here under discussion. Even more significant is the fact that, despite the assertion by the Supreme Court in the *Way* case that an insurance contract for a premium at less than the scheduled rate was not void in the absence of an express statutory provision to that effect, the 1947 codification still contains no such provision.

In this connection the observations of the Supreme Court of Washington in *Yakima Valley Bank & Trust Co. v. Yakima County*, 149 Wash. 552, 556, 271 Pac. 820 (1928) are apposite:

“At the extraordinary session of the legislature in 1925, a new act was passed governing the assessment, levy and collection of taxes. But an investigation of its terms indicates that it is a codification of already existing statutes for the most part.
* * *.”

“It is a familiar rule of statutory construction that, when a statute has once been construed by the highest court of the state, that construction is as much a part of the statute as if it were originally written into it. 36 Cyc. 1143. The rule is stated by Ruling Case Law, Vol. 25, p. 1075, as follows:

“ ‘Construction of Re-enacted Statutes. — It is a settled rule of statutory construction that when a statute or a clause or provision thereof has been construed by the court of last resort of a state, and the same is substantially re-enacted, the legislature adopts such construction, unless the contrary is clearly shown by the language of the act, or the rules of statutory construction have been changed.’ ”

As recently as October 31, 1957, the Supreme Court of the State of Washington has reaffirmed the doctrine of the *Way* case, to the effect that a provision in a regulatory statute invalidating a certain type of contract does not render such a contract void, in the absence of an express provision to that effect. In *Graves v. Cascade Natural Gas Corp.*, 151 Wash. Dec. 207, the court approved recovery on a contract for legal services, al-

though the public utility regulatory statute provided that the said contract was not valid. The reaffirmance of the doctrine of the *Way* case is apparent in the following quotation from the opinion (p. 210) :

“Nor is there merit in the defendant’s contention that the contract was void under the provisions of R.C.W. 80.16. That chapter is a part of the law of this state regulating public utilities and provides, *inter alia*, that no arrangement between a public utility and an ‘affiliated interest’ is valid unless and until it is approved by the public service commission. We will assume, for the purposes of argument, that the plaintiff firm was an affiliated interest, within the meaning of the statute, because one of its members was made a director of the corporation. Nevertheless, we cannot agree with the defendants that, for this reason, the contract was unenforceable. The penalty for failure to submit a contract or arrangement to the commission for approval is prescribed in R.C.W. 80.16.060. Payments made under such a contract or arrangement will be disallowed in computing rates until they have been approved. There was no evidence that the payments made under the plaintiffs’ contract were disallowed for this purpose.

“The defendant urges that a contract ‘invalid’ under the statute is void and unenforceable. But we cannot agree with this interpretation. If such an arrangement were void, the provision for commission approval after payments had been made would be unnecessary. The very fact that a contract may be approved after payments have been made, even though it was not submitted in the first instance, negatives a legislative intent to make such contracts void. Furthermore, had this been the legis-

lative purpose, the word 'void' could have been used, as it was in R.C.W. 80.12 dealing with attempted transfers of public utility property without commission approval."

Appellant's second attempt to avoid the Way case.

On pp. 24-5 of its brief Appellant contends that in the *Way* case the parties agreed only on the lower premium while here the parties also had a second agreement on a higher premium. Where is this alleged second agreement here? According to Appellant, it rests on the premium figure of \$47,753.72 which was inserted in the blank space in Appellee's bond application. The Appellant realizes, however, that "the Appellee will urge the contention that the Appellant was not authorized to insert the sum of \$47,753.72 * * * but was only authorized to insert the sum of \$35,576.79 * * *." Appellee does so urge, and points to the record in support of its contention (R. 205-8, 265-70, 297-300). In addition, the Insurance Code of 1947 makes Appellant's unauthorized insertion a criminal offense, and bars its action based upon such an insertion:

"Sec. .18.07 *Alteration of Application*: 1. Any application for insurance in writing by the applicant shall be altered solely by the applicant or by his written consent, except that insertions may be made by the insurer for administrative purposes only in such manner as to indicate clearly that such insertions are not to be ascribed to the applicant. Violation of this provision shall be a misdemeanor.

"2. Any insurer issuing an insurance contract upon such an application unlawfully altered by its officers, employee, or agent shall not have available

in any action arising out of such contract, any defense which is based upon the fact of such alteration, or as to any item in the application which was so altered." R.C.W. 48.18.070.

But Appellant then says that this contention of unauthorized insertion is not available to Appellee because Appellee supposedly "ratified" the unauthorized insertion of the higher premium figure in the application form when in June, 1955, it accepted and delivered to the United States the Appellant's surety bond containing a recital that the premium was \$47,753.72.

Appellant's contention that Appellee "ratified" the higher premium was not presented to the trial court in any form. Consequently Appellant must now urge that this "ratification" occurred wholly as a matter of law. It is clear, however, that a person "ratifies" an act only when he has both the intent to approve the act and full knowledge of all the circumstances. 36 Words and Phrases 132-7 (1940); *Id.* 18-19 (Cum. Supp. 1957). The Supreme Court of the United States said in *Owings v. Hull*, 9 Pet. (34 U.S.) 607, 9 L.Ed. 246, 254 (1835) (cited by Appellant on a different point):

" * * * No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud. * * *."

It is clear that in the instant case both the intent and knowledge necessary for "ratification" were lacking.

It may be noted in passing that the premium figure recited in the performance bond, whose acceptance by Appellee supposedly “ratified” the recital, appears only on the reverse side of the bond, and that the Appellee’s president, Martin Anderson, signed the bond only on its face (R. 116). There was no evidence that Mr. Anderson saw this figure when he signed the bond and passed it on for delivery. Even if Mr. Anderson did see this figure on the back of the bond, his delivery of the bond is not a “ratification” of the same figure which was inserted without authorization in the application form to make the alleged contract upon which Appellant sued.

The premium agreement between Appellant’s agent, John C. Beeson, on the one hand, and Appellee and other members of its joint venture on the other, was made in May, 1955. It undertook to give Appellee the benefit of an anticipated reduction in rates which was actually made in July, 1955. When Appellee received Appellant’s bond in June, 1955, and delivered it to the United States, the exact amount of the premium to be charged was then unknown and incapable of computation, and did not become ascertainable for another month. This is not like the situation where seller and buyer agree on a definite price of \$100 and the seller then bills the buyer at \$125, and the buyer “ratifies” the higher price. It cannot be said as a matter of law that Appellee, in delivering the bond, intended to approve the unauthorized insertion in its bond application of the premium figure of \$47,753.72, ascertained under an existing rate schedule, when Appellee knew that under its express agreement the actual premium would

not become known until some time later. Although Appellant also seeks on pp. 43-4 of its brief to make this "ratification" argument on the basis of a billing turned into an "account stated," the jury also found against Appellant on this.

Appellant gets no aid from the fact that the standard form of bond prescribed by the United States has a blank space for the amount of premium to be filled in, and that the instructions on the back of the form state that "there shall be no deviations from this form." We may speculate that this was intended to protect the United States by making it more difficult for a contractor to pad his bond cost on a "cost plus" contract with the government. The government contract which Appellee performed in this case was, however, a "lump sum contract" (Ptf. Ex. 1, R. 6) and the statement of the amount of premium is of no conceivable benefit to the United States. Even if it were, no rights of the United States are involved here, and Appellant does not show why this technical requirement of the United States should operate in any way to affect the rights and obligations of the surety and principal between themselves.

The record contains further evidence not only that the Appellee did not "ratify" the unauthorized insertion of the higher "board" premium in its bond application, but that Appellant through its agents recognized there had been no such "ratification."

Appellant's bonds in this case were sold to Appellee and to Islands Construction Co., another member of the joint venture, by Appellant's general agent, Mc-

Collister & Co., through John C. Beeson, McCollister's vice-president and Appellant's attorney-in-fact. Moreover, McCollister & Co. sent out the premium statements and collected the premiums on Appellant's bonds (R. 124, 208, Ptf. Ex. 4). Before this, Martin Anderson, president of Appellee, and Loren Baldwin, president of Islands, had dealt with McCollister & Co. and Mr. Beeson in connection with surety bonds for sixteen years (R. 264, 293-4). In all that time McCollister & Co. had never refused to discuss bond premium adjustments with them on the ground that the protests were not timely (R. 271). In this case Mr. Anderson and Mr. Baldwin discussed an adjustment of the bond premium with Mr. Beeson several times from October to December, 1955, and were told that Mr. Beeson was working on it. They understood that they would pay only the reduced premium (R. 212-14, 270-6, 302-6). Finally, Mr. Nelson Friday, president of McCollister & Co., asserted that adjustment was impossible because of the Appellant's alleged reinsurance commitment on the basis of the pre-July "board" premium rate (R. 230-1, 272-3).

Appellant's third attempt to avoid the Way case.

On p. 26 of its brief Appellant says that:

" * * * There [in the *Way* case] the only contract sued on had been completely performed by full payment; here the legal contract sued on has been but partly performed by installment payments. There the party plaintiff sought the aid of the court to avoid the rebate agreement; here the party defendant sought the aid of the court to enforce the rebate agreement."

This is simply a restatement of the Appellant's preceding argument on "ratification." Here the "legal contract" and the only contract was the agreement for the premium at the anticipated reduced rate. There was no different contract for a higher premium, although Appellant seeks to find one in the supposed "ratification" of the unauthorized insertion in the Appellee's bond application. Both here and in the *Way* case the defendant promised a lower-than-scheduled rate. In the *Way* case the defendant paid the agreed premium. Here Appellee has paid or tendered all the agreed premium (Pars. VIII, XII of Admitted Facts, R. 57-8, 59). In both cases the plaintiff sought to avoid the agreed rate and in both cases the defendant asked the court to enforce it.

Appellant's fourth attempt to avoid the Way case.

On p. 26 of its brief Appellant states that the *Way* case involved an agreement for a reduced rate on an insurance policy issued to protect the defendant as assured; and that the court there held the agreement valid because the "rebate" provisions of the Insurance Code of 1911 contained an express penalty in the form of a reduction of the amount of insurance. Appellant then contends that here the agreement was for a reduced rate on a surety bond issued to protect the United States; and that this agreement is void because the "rebate" provisions of the Insurance Code of 1947 do not contain such an express penalty (the reduction of insurance, although provided for, being inappropriate in the case of a surety bond). Assuming *arguendo* that the "rebate" provisions of the 1947 Code have any applica-

tion at all to this surety bond situation, which Appellee denies, the argument of Appellant attains plausibility only through Appellant's omission of part of both the statutes on which it relies, and through Appellant's omission of the language of the *Way* opinion which mentions this part of the 1911 Code. As seen from the full comparison set forth above on pp. 20-3, the "rebate" provisions of the 1911 Code and the 1947 Code are in substance the same. Both contain an express penalty of loss of license for one giving a prohibited premium reduction, and a penalty of a \$200 fine for one receiving such a reduction. The *Way* case, as seen in the quotation set forth above, expressly mentions the latter penalty. In the light of this fuller examination the *Way* case and this case again turn out to be virtually the same.

Appellant's fifth attempt to avoid the Way case.

On pp. 27-8 of its brief Appellant contends that the Supreme Court of Washington would not have said what it did in the *Way* case if Secs. .18.18 and .18.19 of the Code of 1947 (set forth above) had been in force at the time. We need not indulge in such speculation.

Secs. .18.18 and .18.19 have already been quoted and discussed briefly above on p. 11 in connection with the "rebate" provisions of the 1947 Code. Since these sections refer to an insurance "policy," they have no application to this case involving surety bonds. Appellant's argument for the applicability here of these sections attains plausibility only because Appellant takes the following liberties with the words of the sections:

(1) Part 1 of Sec. .18.18 provides that "The premium

stated in the policy [bond] shall be inclusive of all * * * consideration charged for the insurance * * *.” The use of the word “inclusive” might well mean that the premium figure stated in the “policy” [“bond”] shall be only a maximum, *i.e.*, that the premium charged shall not exceed that stated in the “policy” [“bond”]. Appellant says, however, that the word “inclusive” means that the “correct amount of premium be stated in the bonds.” If this meaning is accepted, other consequences follow from the parts of the section which Appellant omits from its quotation. Part 2 provides that no insurer “shall charge * * * any * * * consideration for insurance which is not included in the premium specified in the policy [bond].” And Part 3 of the section provides that “Each violation of this section is a gross misdemeanor.” If we accept Appellant’s contention that the word “inclusive” in Part 1 requires a statement in the bond of the “correct” premium and not just the maximum to be charged, then it follows that Appellant’s charging a lower premium than that specified in the “policy” [“bond”] would subject it to a criminal penalty. And under the *Way* opinion, which relied on the statutory provision for penalties in the form of a fine as well as reduction of insurance, the express imposition of this penalty in Sec. .18.18 makes it exclusive of any other, so that the agreement here for a reduced premium is still valid.

(2) Appellant quotes Sec. .18.19 in full:

“Sec. .18.19 *Must Contain Entire Contract*: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”

In attempting to apply this section on p. 27 of its brief, the Appellant again reads the word “bond” for “policy.” This switch, while unwarranted, can at least be made in the “rebate” sections and in Sec. .18.18 noted above, without totally destroying their sense when applied to surety insurance. But reading the word “bond” for “policy” in Sec. .18.19 leaves the section as remote from application to surety insurance as if the substitution were not made. Accepting *arguendo* the Appellant’s assumption that the word “policy” means “bond,” the section would then read for surety purposes that the “policy” [“bond”] must include the entire “contract of insurance” between Appellant insurer and Appellee. But this is no help to Appellant, for the bond here does not contain any contract at all between Appellant and Appellee. The contract upon which Appellant sues is allegedly contained in Appellee’s application form. (Appellant states on p. 24 of its brief that the Appellee “bound itself” to pay the higher premium “in its application for the bonds.”) To avoid this difficulty, the Appellant turns the statutory words “contract of insurance” in Sec. .18.19 into the words “amount of premium.” With this second switch, Appellant makes the section say something different from its own declaration. The section then declares, says Appellant on p. 27 of its brief, that “no modification of the amount of premium [contract of insurance] ‘shall be valid unless in writing and made a part’ of the bonds [policy].” But after substituting “policy” for “bond” and “amount of premium” for “contract of insurance,” in order to get under the statute, Appellant has to slide back somehow to the bond application of Ap-

pellee which allegedly contains the contract sued upon. So Appellant says on p. 28 of its brief that the contract on which it relies has now become not just the "policy" or "bond" but "three documents" consisting of the bond application, the performance bond, and the payment bond. Merely to follow this distortion of the statute is to perceive its inapplicability to this case. In addition, by the express terms of the 1947 Insurance Code, the application which in this case was not attached to the "policy" ["bond"] could not be considered a part of the insurance contract. The applicable sections are set forth above at pp. 12, 26-7.

Appellant's sixth attempt to avoid the Way case.

As noted above, the *Way* case has been cited repeatedly with approval by the Supreme Court of Washington on the point involved here. One of these approving opinions was delivered in the insurance case of *Kidder v. Hartford Accident & Indemnity Co.*, 126 Wash. 478, 218 Pac. 220 (1923), upholding an oral contract of accident insurance although the Insurance Code of 1911 required the written policy to contain the entire contract. Appellant glosses over this case on p. 29 of its brief with the remark that "The ruling is without authoritative precedent for this court because it involved different parties, different issues, and different provisions of statute." But an examination of the *Kidder* opinion reveals its pertinence here.

In the *Kidder* case the plaintiff sued an insurer on an oral contract of accident insurance. The insurer's defense was "that it could not obligate itself except upon

the issuance of a written policy at the rate filed.” 126 Wash. at 479. To this defense the Supreme Court said at 126 Wash. 480:

“ * * * In the case of *Way v. Pacific Lum. & Timber Co.*, 74 Wash. 332, 133 Pac. 595, 49 L.R.A. (N.S.) 147, there was called in question the provisions of the insurance code making it unlawful to sell insurance at less than the scheduled rate. It was held in that case that error lies in the assumption that the contract between the agent and insured was void, whereas the rule is that a contract which violates a statutory regulation of itself is not void unless made so by the terms of the act. It is not claimed, as we understand, that there is any provision of the insurance code which for that reason either avoids or prohibits an oral contract of insurance. * * *.”

The court then analyzed the applicability of the Code to different kinds of insurance and held that one section which Appellant contended applied to accident insurance was intended, although found in a division of the Code devoted to life, health and accident insurance, to apply only to life insurance. After quoting another Code section cited by Appellant, the court said (126 Wash. 481-2):

“This section deals with written health and accident policies and has nothing to do with oral contracts therefor. Suppose that a health and accident policy were written and delivered in violation of the terms of the section, there is nothing in the section which provides that the policy shall be void, for ‘the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act.’ *Way v. Pacific Lum. & Timber Co.*, *supra*.

“In the case of *Ogle Lake Shingle Co. v. National Lum. Ins. Co.*, 68 Wash. 185, 122 Pac. 990, this court said: ‘It is now well established that contracts of insurance may rest in parol.’ While it is true the cases from this court referred to were fire insurance cases, we are aware of no reason why the rule should be different in accident insurance cases, under our statutes. All of them are governed by the rule stated in *Sutherland*, *Statutory Construction*, quoted in *Way v. Pacific Lum. & Timber Co.*, *supra*, as follows:

“ ‘When a statute is . . . a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest the contract will be valid’.”

Thus the *Kidder* case supports the contention of Appellee here in two important respects:

(1) The *Kidder* case shows that because the Insurance Code (of both 1911 and 1947) deals with all kinds of insurance, a given provision of the Code must be analyzed carefully to determine its applicability to a given kind of insurance. There the court held that the insurer could not apply to its accident insurance a section of the Code which examination revealed was directed only to life insurance. Similarly the Appellant here cannot apply to its surety insurance the “rebate” provisions of the Code which examination reveals are directed only to kinds of insurance where “policies” are issued.

(2) The *Kidder* case also affirms the rule of the *Way*

case that an insurance agreement which violates a statute is not void unless the statute expressly makes it so. This was applied in the *Way* case to property insurance, in the *Kidder* case to accident insurance, and in this case should be applied to surety insurance.

Appellant's seventh attempt to avoid the Way case.

On pp. 30-33 of its brief the Appellant cites four cases involving the Insurance Code of 1911, in an attempt to show that the *Way* case is not controlling here:

(1) On p. 30 of its brief Appellant sets forth a quotation from *Gray v. Boyle*, 55 Wash. 578, 579, 104 Pac. 828 (1909) in which the court, considering the rights of the holder of a negotiable instrument, expressly "assumes" the very point at issue here in a case between an insurer and its insurance customer. If this dictum ever were relevant in a situation like that presented here, it need only be observed that the *Gray* dictum was overruled by the *Way* case four years later.

(2) On p. 30 of its brief Appellant seeks to apply a quotation from *Calvin Phillips & Co. v. Fishback*, 84 Wash. 124, 128, 146 Pac. 181 (1915) to facts which are the very reverse of those to which the quotation is addressed and which are present here. In the *Calvin* case, the Insurance Commissioner of Washington sued on the basis of the *Way* case to revoke the license of an insurance agent for his alleged violation of the "rebate" statute. The court held that there had been no "rebate" and also said that the *Way* case was of no help to the Commissioner because its rule was "that one cannot avoid his contractual obligations because

of his own violation of statutes * * *." 84 Wash. at 128. This quoted rule does, however, bar Appellant's action here. Appellant is the one seeking to avoid its contract for the reduced premium on the ground that the contract violates the Insurance Code. Appellee is not seeking to avoid its premium contract but is standing upon it.

(3) On pp. 31-2 of its brief Appellant seeks to apply a quotation from *Moser v. Pantages*, 96 Wash. 65, 69-70, 164 Pac. 768 (1917) to facts quite different from those to which the quotation is addressed and from those which are presented here. In the *Moser* case an insurance agent sued on the basis of the *Way* case to collect premiums on policies which he had sold in violation of the "rebate" statute. The court held the *Way* case of no aid to him because "We were there considering a contract which the agent was seeking to avoid for his own benefit," and the rule held applicable in the *Moser* case was "that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." 96 Wash. at 70. It is obvious from this statement that the *Way* rule does apply to the instant case involving a contract for a reduced premium which Appellant is seeking to avoid for its own benefit.

(4) On pp. 32-3 of its brief Appellant sets forth a quotation from *Wolfe v. Philippine Investment Co.*, 175 Wash. 165, 168, 27 P.2d 132 (1933) which simply mentions the *Calvin* and *Moser* cases and which Appellant does not try to relate to the instant case.

From the foregoing examination of Appellant's

seven attempts to avoid the *Way* case it is clear that none is valid and that its rule is applicable here. We do not contend that, in all cases, a contract which does not comply with a statute is nevertheless valid between the parties. We do contend that this is a question of public policy within the province of the state legislature and the courts of the state, in any given case. We contend that in this instance the Supreme Court of the State of Washington has declared that there is no public policy in that state and no legislation which makes the instant agreement void. There is no public policy in Washington, in short, which would invalidate the fair and just agreement between these parties and enable Appellant and its agents to profit by their own alleged misquotation of rates, despite plainest principles of estoppel.

2. Appellant's agent had authority to bind Appellant on the premium agreement

The agreement in this case for a premium at a reduced rate shortly to be determined was made between Martin Anderson and Loren Baldwin, presidents respectively of Appellee and of its co-venturer Islands Construction Co., and John C. Beeson, attorney-in-fact of Appellant and vice-president and a shareholder of McCollister & Co., general agents of Appellant. Appellee contends that Mr. Beeson's agreement was binding upon Appellant because within the apparent scope of his authority. This issue was submitted to the jury under an instruction (R. 342-3) to which Appellant made no objection. Therefore Appellant must now con-

tend that Mr. Beeson had no authority to bind Appellant as a matter of law.

The evidence upon which the question of Mr. Beeson's authority was submitted to the jury is summarized above on pp. 2-5 in Appellee's statement of the case. We note here simply that Appellee and its co-venturer have been supplied with bonds for many years by Mr. Beeson, who was attorney-in-fact for Appellant and also vice-president, shareholder and bond specialist of McCollister & Co., Appellant's general agent. It was the expected function of Mr. Beeson and McCollister & Co. to choose the bonding company. Mr. Beeson executed Appellant's bonds here. Mr. Anderson and Mr. Baldwin, with whom Mr. Beeson made the premium agreement, did not know that the Insurance Commissioner had anything to do with bond rates, and the computation of a premium required skill and familiarity with a rate manual which Mr. Beeson had but which Mr. Anderson and Mr. Baldwin did not have.

As a general rule, where an agent is expressly authorized to sell property for his principal, he is also given implied or apparent authority to fix the price of the sale, and a person dealing with the agent is entitled to rely upon this apparent authority. In *Galbraith v. Weber*, 58 Wash. 132, 107 Pac. 1050 (1910), the plaintiff delivered a horse to his agent with authority to sell it. The agent sold the horse to the defendant for \$1,000 in notes, discounted the notes, forged notes for \$2,700 and gave them to the defendant, and disappeared. The plaintiff sued to recover the horse from the defendant, contending that his agent had no authority

to sell the horse for the price which defendant had paid. The court affirmed a judgment for the defendant based upon a jury verdict, saying (58 Wash. 137-8) :

“We will first notice Boquet’s [agent’s] apparent power to fix the purchase price. Where the agent has exclusive possession of the property of his principal with authority and for the express purpose of selling it to any purchaser he may find, as in this case, we think a purchaser from such agent would clearly have the right to rely upon the agent having power to agree upon the purchase price. 2 Enc. L. & P. 1001; Mechem, Agency, §362; 1 Clark & Skyles, Agency, §245; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S.E. 980.

“ * * * So we do not think that these circumstances were so extraordinary as to enable us to say, as a matter of law, they showed want of authority on the part of Boquet to agree upon a sale at \$1,000.”

The *Galbraith* case has been recently cited with approval on the point of apparent authority in *Larson v. Bear*, 38 Wn.2d 485, 490, 230 P.2d 610 (1951), where the court said:

“An agent may have what is termed ‘apparent’ authority. It exists when, though not actually granted, the principal knowingly permits the agent to perform certain acts, or where he holds him out as possessing certain authority; or, as sometimes expressed, when the principal has placed the agent in such position that persons of ordinary prudence are led to believe and assume that the agent is possessed of certain authority, and to deal with him on reliance of such assumption. *Galbraith v. Weber*, 58 Wash. 132, 107 Pac. 1050; *Cannon v.*

Long, 135 Wash. 52, 236 Pac. 788; *Mohr v. Sun Life Assurance Co.*, 198 Wash. 602, 89 P.2d 504; 2 Am. Jur. 68, Agency, §85."

The rule of the *Galbraith* and *Larson* cases applies equally to this case unless there is some important distinction in the fact that contracts for the sale of horses are not regulated by statute and contracts for the sale of insurance are regulated by statute in some respects. Appellant argues on p. 36 of its brief that the premium agreement made by its agent Beeson was illegal and that an agent has no implied authority to bind his principal upon an illegal contract. To support its contention of illegality, Appellant relies on the "rebate" provisions of the Insurance Code of 1947. As we have seen, however, these provisions do not purport to apply to surety bond premiums and, even if these provisions should be held applicable, their stipulation of express penalties for violation leaves this premium agreement valid under the *Way* case. The rule of the *Way* case applies as well where a premium agreement is made by an insurance agent in violation of the statutory requirement that only the rate then filed be charged. The provisions of an express penalty for this violation again leaves the agreement of the agent valid.

If Appellant's argument were accepted, no corporation could ever be held liable for statutory violations or torts committed by its employees. Yet in both types of cases it is well settled that the act of the agent is that of his corporate principal.

The case of a statutory violation is illustrated by *Regan v. Kroger Grocery & Baking Co.*, 396 Ill. 284,

54 N.E.2d 210, 1 CCH Price Control Cases, Par. 51,107 (1944). There the plaintiff sued a corporation for treble damages for sales made in violation of OPA price regulations. One defense was that the sales were made by agents of the defendant without its knowledge, approval or consent, and in contradiction of its instructions to comply with OPA regulations. To this the court said:

“It is our conclusion that a corporation, subject to the provisions of the act, is liable for violations by those whom it selects as its representatives, in making sales. This is true regardless of the fact that such representatives are minor in character and have no official status in the corporation and no authority in the formation of its policies, and no voice in the adoption of its practices. In making sales in the line of their employment, such employees are the corporation itself. It can neither repudiate nor disown the acts of its employees, engaged in transactions which they were employed to make.”

Similarly, in *Globe & Rutgers Ins. Co. v. Draper*, 66 F.2d 985 (9th Cir. 1933), this Court held that an insurance company's agent was authorized to bind his company on an oral contract of fire insurance despite the contention of the company that oral contracts of insurance were contrary to the public policy of the State of Washington as set forth in its Insurance Code and that the agent had no express authority to bind it on an oral contract. In the *Globe* case the insurer appointed the San Francisco firm of Edward Brown & Sons its general agent with power to appoint sub-agents; the San Francisco firm then appointed the Spokane firm

of Hahn & Daly local agents of the insurer; one Hahn, a member of the Spokane firm, made the oral contract with plaintiff which was orally accepted by one Weaver in the San Francisco firm. 66 F.2d at 987. Here Appellant surety company appointed the Seattle company of McCollister & Co. its general agent and appointed Mr. Beeson, a vice-president and shareholder of McCollister, its attorney-in-fact. Mr. Beeson made the premium agreement with Appellee.

Concerning the liability of a corporation for torts committed by its agents, the Supreme Court of the United States has said in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 684, 93 L.Ed. 1628, 1638 (1948):

“ * * * It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent’s liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal. It does not mean, therefore, that the agent’s action, because tortious, is, for that reason alone, *ultra vires* his authority. An argument to that effect was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected. [Citing cases.]

“There is, therefore, nothing in the law of agen-

cy which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. * * *

Appellant bases its rule that an agent has no implied authority to bind his principal upon an "illegal" contract upon a quotation from the opinion of Mr. Justice Story in *Owings v. Hull*, 9 Pet. (34 U.S.) 607, 9 L.Ed. 246, 253-4 (1835). An examination of that case reveals, however, that the quotation and the rule which Appellant seeks to draw from it have no application to this case.

In the *Owings* case the defendants, executrices of an estate in Louisiana, made one West their attorney-in-fact with power "to cause such proceedings to be instituted, as may be necessary to effect a sale of the whole real and personal estate" of the testatrix "and generally to do, negotiate and perform all other acts, matters and things in the premises, that circumstances may require, as well judicially, as extrajudicially, for the effectual settlement of the estate, &c." 9 L.Ed. at 247. The agent West privately sold to the plaintiff certain slaves belonging to the estate, and pocketed most of the purchase price. The beneficiaries of the estate sued the plaintiff in Louisiana and recovered the slaves, the court holding that the private sale by West "was absolutely void, because, by the laws of Louisiana, executrices can only sell after an order of court and by public auction, and not by private sale; * * *." *Ibid.* The plaintiff then sued the defendant executrices in Maryland to recover the purchase price which he had paid West for the slaves. In his opinion Mr. Justice Story held that the lower court should have given the instruc-

tion which the defendants requested, and which is discussed in the quotation set forth on p. 36 of Appellant's brief. In addition Mr. Justice Story said (9 L.Ed. at 254) :

“The next instruction asked was for the court to instruct the jury that, unless they believed that John K. West strictly complied with the special instructions given him by the defendants in the power of attorney of January, 1816, and caused such legal proceedings to be instituted as were necessary to effect a sale of the personal estate in Louisiana, of which their testatrix died possessed, and under such legal proceedings made a sale of the slaves, being part of the personal estate, to the plaintiff (Hull), and that the slaves were subsequently recovered from the plaintiff, the plaintiff is not entitled to recover. For the reasons already given, this instruction ought also to have been given. *This is not the case of a general agency, but a special agency, created by persons acting in autre droit.* The purchaser was therefore bound to see whether the agent acted within the scope of his powers; and, at all events, he was bound to know that the agent could not, in virtue of any general power, do any act which was not in conformity with the laws of Louisiana. The principals could never be presumed to authorize him to violate those laws; and the purchaser purchasing a title invalid by those laws, must have purchased it with his eyes open.” [Emphasis added.]

The language of the *Owings* opinion is inapplicable to the question of the apparent authority of Beeson in the instant case for the following reasons:

(1) There the agent's contract had been held by a

court to be “absolutely void” as a matter of law; here the contract made by Appellant’s agent, Mr. Beeson, is valid.

(2) There the agent on behalf of his principal had dealt with the purchaser in a single transaction; here the agent John Beeson, on behalf of Appellant, had dealt with Appellee in a continuing series of transactions of the same kind over many years.

(3) There the agency was a limited one; here the agency for Appellant was a general agency.

On p. 37 of its brief Appellant sets forth a quotation from *Charette v. American Surety Co., etc.*, 49 Wn.2d 777, 780, 307 P.2d 252 (1957) which is doubtless correct as a statement of law but which was applied there to a quite different set of facts than are presented here. In the *Charette* case an insurance agent, in a single transaction with a guardian, wrote a guardianship bond. The agent had no express authority to write such a bond and the court held that the insurer had not relied upon any representation of his authority.

Appellant’s mainstay in its argument concerning the lack of apparent authority of Mr. Beeson is *American Surety Co. v. Lind*, 132 Wash. 326, 232 Pac. 280 (1925), whose opinion Appellant sets out in full on pp. 37-42 of its brief. The difference between the *Lind* case and this case is apparent in the following language from the *Lind* opinion:

“ * * * R. L. Kline was then the local agent at Bellingham of the surety company, but without authority to write or execute a bond of this nature for this amount. His authority was to take written

applications for such bonds upon blank forms furnished by the company to be signed by the applicant and then forwarded to the general manager and resident vice president of the surety company at Seattle for acceptance or rejection by him, and the execution of the bond by him as surety for the company, if the application be accepted.

“Lind was well aware of this limited agency power on the part of Kline * * *.” 132 Wash. at 327.

* * *

“ * * * The application was by Kline forwarded to the general manager and resident vice president at Seattle; and, in compliance with the data and information appearing thereon, after the filling of the blanks, the bond was executed by the surety company as surety and by Lind as principal and delivered to the proper authorities of the United States, as provided by the construction contract theretofore signed. The body of the bond does not seem to show the amount of the premium charged by the surety company.

“A short time after the execution of the bond, the surety company presented to Lind a bill for the premium, claiming \$2,790 due thereon. * * *.” 132 Wash. at 329.

* * *

“We are not here concerned with any claimed special premium rate contract entered into between Lind and the general manager and resident vice president of the surety company. Whether such a special contract rate with the general manager and resident vice president could be enforced by Lind as against the surety company, we need not here inquire. * * *.” 132 Wash. at 330.

Contrast the *Lind* situation with that in the instant case where Beeson, the agent who made the premium agreement, was the attorney-in-fact of Appellant, and signed the bond for Appellant; he was vice-president, shareholder and bond specialist of McCollister & Co., the general agent of Appellant; the billing for the bond premium was made by McCollister & Co.; McCollister and Beeson had been furnishing Appellant's bonds to Appellee for many years; the choice of bonding company was left to Mr. Beeson and McCollister & Co., and only they had the necessary rate information. In addition, Appellant was preparing a reduction of its premium rate of which Beeson had knowledge, in order to make its bonds competitive with those of "non-board" companies whose rates were then available to Appellee and which Appellee was willing to pay.

Appellee submits that on this evidence it cannot be said as a matter of law, as Appellant contends, that Beeson had no implied authority to make this premium agreement. This question was properly submitted to the jury under the instructions of the trial court and the jury properly found in favor of Appellee.

3. There was no "account stated" for a higher premium than that promised by Appellant's agent

Appellant contends on pp. 43-4 of its brief that Appellee failed to make timely protest to statements by McCollister & Co. showing a higher premium than that promised by Appellant's agent, and that this established an "account stated" on which Appellant is entitled to recover. This issue was submitted to the jury under an instruction (R. 345-6) to which Appellant

made no objection. In reaching its verdict the jury necessarily found that there was no account stated. Consequently Appellant must now be urging that an account stated arose solely as a matter of law.

Appellant urges an account stated in the fact that Appellee made payments without protest in September and October, 1955, after receiving statements showing the higher premium amount. It is admitted that these payments were made without protest. This simply means, however, that neither payment was accompanied by a letter to that effect. And the testimony shows why this was unnecessary. Mr. Anderson and Mr. Baldwin, presidents respectively of Appellee and of its co-venturer Islands Construction Co., began to protest orally to Mr. Beeson about the higher premium in September, 1955. In sixteen years of prior dealings with them, McCollister & Co. had never refused to discuss bond premium adjustments with Mr. Anderson or Mr. Baldwin on the ground that the protests were not timely (R. 271). They discussed an adjustment of this bond premium with Mr. Beeson several times from October to December, 1955, and were told that Mr. Beeson was working on it. They understood that they would pay in accordance with their original agreement for the reduced rate, and relied on this understanding in making the payments on account (R. 212-14, 270-6, 302-6).

This testimony qualifies, but does not contradict, the admitted fact that the payments of September and October, 1955, were themselves transmitted without pro-

test. And Appellant waived any objection to this testimony by failing to object to its admission at the trial.

The court's instruction on the issue of account stated was supplied by Appellee in its requested instruction No. 3 (R. 82). Its statement of the law is supported by the following authorities, the first two of which were cited to the trial court (R. 82): 1 C.J., Accounts and Accounting §§249, 251, 264, 276, 289; *Austin v. Union Lumber Co.*, 95 Wash. 608, 610, 164 Pac. 245 (1917) (holding that account stated is "largely a question of intent, to be gathered from the facts of the particular case"); *Goodwin v. Northwestern Mut. Life Ins. Co.*, 196 Wash. 391, 410, 83 P.2d 231 (1938) (holding that execution of contracts and making of payments on basis of statements retained without protest over several years did not create account stated); *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, 68, 161 Pac. 1197 (1916) (holding that silence upon receiving bill and repeated demands for payment "does not of itself constitute an implied agreement as to any sum due to appellant"); *Merritt v. Meisenheimer*, 84 Wash. 174, 146 Pac. 370 (1915) (holding that retention of bills without protest for nearly a year did not create account stated).

The foregoing cases all clearly indicate that the question what length of time of retention of a bill without protest would create an account stated is a jury question under ordinary circumstances. Submission of the issue to the jury here was not error.

CONCLUSION

We have demonstrated, we submit, that the premium agreement herein which the jury verdict confirmed was a valid agreement and that the trial court was right in upholding it. The result is fair. Appellee has paid the same premium which it would have paid to get an acceptable bond from a "non-board" company. It has paid the premium which Appellant would have admittedly charged for this bond if it had been issued a month later, at a time when this bond still had twenty-three months of its two-year term to run.

Were it not for the promise of Mr. Beeson, upon which Appellee and its associates justifiably relied in good faith, Appellee would have purchased "non-board" bonds (R. 270, 300). The cost to Appellee would have been the same. Appellant, however, would not have got the business. By now attempting to repudiate the basis upon which the business was obtained, Appellant seeks to gain an unconscionable \$11,938.43 and its agency an even more unconscionable increase of commission exceeding \$2,000. If Washington public policy demanded such a result, the injustice would have to be borne. Fortunately, however, there is no such public policy in Washington. Companies like Appellant can not thus profit by deceiving their customers as to their rates. They may not, under Washington law, quote a low rate to get the business, and then sue for a higher amount under pious protestations that they have no selfish motive and are merely protecting the public policy of the State. Common honesty, according to the public policy of the State, requires companies like Appellant

to keep their commitments to their customers, when the latter have acted in good faith. If, in so doing, the companies violate directions of the Insurance Code, that code spells out the penalties, and these are exclusive. The companies are not allowed to profit by their own deception. That, as we understand it, is the public policy of Washington in this field. If this is so, there can be no doubt but that the judgment below was correct and should be affirmed.

Respectfully submitted,

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No. 15681

United States Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation, *Appellant*,

vs.

ANDERSON CONSTRUCTION Co., Inc., a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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THE ARGUS PRESS, SEATTLE

FILED

DEC 17 1957

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

REBATE PROMISE INVALID

The brief of appellee shows that it continues to resist recovery of the balance due for the appellant's lawful premium fixed by its applicable rates filed with and approved by the Insurance Commissioner, upon the ground that the oral promise of appellant's agent to charge a lower premium to be calculated at future undetermined rates neither filed nor approved, did not constitute a rebate.

In this effort, to escape the effects of the Washington Insurance Code, the brief of appellee (pp. 9, 10) said:

“Initially we maintain that the oral premium agreement is valid and that these ‘rebate’ provisions simply do not apply to surety bond premiums at all. These provisions purport only to prohibit the giving and receiving of ‘rebates’ of premiums

on insurance '*policies*.' Surety insurance contracts and surety bonds are not '*policies*' either in common usage in the business world or in the Insurance Code."

On these primary propositions, the brief of appellee places much emphasis. However, these propositions are fallacious.

First, as to common usage, careful text authors disagree with the contention of appellee. Two such authorities, in writing quite some years ago, stated the contrary.

"Suretyship or Insurance — Compensated Corporate Sureties. The distinction between suretyship or guaranty and certain forms of insurance, is shadowy and indistinct. This is notably true of so-called contract insurance, fidelity insurance, and credit indemnity insurance, and contracts of this class have been *construed as policies of insurance* rather than as strict suretyships or guarantees, and are treated of *as insurance policies* in works on insurance when issued in due course of business by corporations chartered for the purpose of writing them, though from the very nature of the risk and the situation of the parties they also involve the application of suretyship principles, and the contract itself takes the form of a bond rather than an ordinary policy of insurance, though in many of its features it resembles the latter. Indeed both suretyship and insurance cases are liberally cited and relied upon by the courts and text-writers in cases involving these '*surety bonds*' as they are commonly called."

Spencer on Suretyship (1913) Section 7, pp. 11, 12.

“In a strict legal sense, the parties to the contract of guaranty insurance are two in number, who will be referred to herein under the names so familiar in other branches of insurance law as the ‘insurer’ and the ‘insured.’ This nomenclature, however, has not been adopted generally by the courts, which still make occasional use of the terms ‘obligor’ and ‘obligee,’ ‘surety’ and ‘employer,’ ‘guarantor’ and ‘guarantee,’ ‘indemnitor’ and ‘indemnitee,’ ‘common surety,’ etc. In the present work the words ‘insurer’ and ‘insured’ will be uniformly employed when referring to the parties to the contract of guaranty insurance, and *the contract itself will be referred to either as a ‘policy’ or a ‘bond.’* This is done for the purpose of assimilating as far as possible in the subject now before us the terminology of general insurance law. Here again there is a noticeable absence of uniformity on the part of the courts in giving a name to the instrument issued by the guaranty companies to the insured. By some it is referred to simply as a ‘bond’; others refer to it as an ‘indemnity contract’; while still others refer to it as an ‘insurance bond’ or ‘guaranty policy.’ Throughout the present work *the terms ‘policy’ and ‘bond’ will be used interchangeably, as identical in meaning and legal effect.*”

The Law of Guaranty Insurance by Frost
(Second Edition, 1909) Section 7, pp. 36, 37.

These quotations alone suffice to reflect that in common usage bonds by a corporate surety like the appellant, being recognized as executed merely within one classification of insurance, have long and often been termed “insurance contracts” or “insurance policies” or just “policies.” However, judicial evidence of such

common usage appears from an early opinion of the Washington Supreme Court (antedating both the Insurance Code of 1911 and the Insurance Code of 1947) wherein that court cited with approval Frost's original edition of his work on "Guaranty Insurance." When quoting the author, the opinion written in 1903 said:

" 'The contract of guaranty insurance is invariably entered into for a compensation, and usually after the fullest investigation, and frequently under stipulations largely technical in character, based upon written representations relative to the nature and extent of the risk. The POLICY is written by a company incorporated for the express purpose of furnishing guarantee bonds as a means of revenue to the corporation and its stockholders.' "

Cowles v. United States Fidelity and Guaranty Co., 32 Wash. 120, 125; 72 Pac. 1032, 1033
(Emphasis added.)

Second, as to the Insurance Code, the contention of Appellee is again wrong. To appraise the legislative usage in the Code, many provisions should be reviewed—these, for the convenience of the court, being quoted in the Appendix to this brief from the official statute, 1947 Session Laws, Chapter 79.

This Appendix shows that the Insurance Code was drafted and enacted in separate Articles with titles designating the subject matter of each. All provisions of the 1947 Code collected in the Appendix have been drawn from Articles numbered and entitled as follows:

Article One:	Initial Provisions
Article Eleven:	Insuring Powers
Article Seventeen:	Agents, Brokers, Solicitors, and Adjusters

Article Eighteen:	The Insurance Contract
Article Nineteen:	Rates
Article Twenty-eight:	Surety Insurance
Article Thirty:	Unfair Practices and Frauds

The titles of these Articles indicate that all treat of broad topics having general application to various kinds of insurance — that is, all except Article Twenty-eight covering “Surety Insurance” only. The Appendix quotes the whole of Article Twenty-eight in its entirety. A reading of Article Twenty-eight shows that in dealing with “Surety Insurance” alone, as a particular category of insurance, the legislature made no special or exclusive provision to effectuate the comprehensive regulatory purpose of the Code. Hence, obviously, the legislature intended to regulate surety insurance by the provisions of general application contained in the other Articles listed, to-wit: One, Eleven, Seventeen, Eighteen, Nineteen and Thirty.

This conclusion is directly fortified by almost the only opinion of the Washington Supreme Court involving surety bonds as affected by the Washington Insurance Code. In the litigation a corporate surety sued to recover its lawful premium on a construction bond guaranteeing performance of a road contract. The opinion said:

“The provisions of our insurance code *here applicable* provide for the establishment of uniform regular premium rates and the filing of schedules thereof in the office of the state insurance commissioner, and also provide for penalties for the failure to observe such uniform rates in making charges for premiums. Section 7076, 7077, 7118,

7147, Rem. Comp. Stat. [P.C. §§2939, 2940, 2980, 3009.]”

American Surety Company v. Lind, 132 Wash. 326, 330; 232 Pac. 280, 282.

In making this ruling, the Supreme Court referred to certain Insurance Code provisions by citing sections of Remington's Compiled Statutes of Washington, in which Section 7077 is the same as Section 33 in the Insurance Code of 1911. This Section 33, also for the convenience of the court, has been quoted at the end of the Appendix to this brief. The present value of considering Section 33 in the repealed Insurance Code of 1911 is that, based on comparison with the current Insurance Code of 1947, the brief of Appellee (p. 20) said: “BOTH THE ‘FILING’ AND THE ‘REBATE’ PROVISIONS OF THE TWO CODES ARE SUBSTANTIALLY IDENTICAL.” This concession by the Appellee coupled with the ruling of the Washington Supreme Court in the case of *American Surety Company v. Lind*, *supra*, makes conclusive that the requirements and prohibitions as to rate filings and rate rebates contained in the Insurance Code of 1947 are applicable to the transaction between the Appellee and the Appellant involved on this appeal. In short, under Section .30.14, the Appellant could not “give” a rebate and under Section .30.17 the Appellee could not “receive” a rebate without committing a violation of express law — despite the use in both these sections of the term “policy,” upon which the Appellee would impress a restricted meaning inconsistent with both common usage and legislative intent.

WAY CASE DISTINGUISHED

The brief of Appellee hangs upon the hope of escape from liability on the contention that the case of *Way v. Pacific Lumber and Timber Company*, 74 Wash. 332; 133 Pac. 595 (1913) is "controlling." But, except for mere dictum, it is not in point. When arguing that by the *Way* case this court is compelled to give the effect of validity to an oral assent to a prohibited rebate in premium, the Appellee avoids quotation of the Washington Supreme Court revealing its real ruling—namely, that the plaintiff insurance agent had failed to prove any agreement by the defendant insured to pay for premium any greater amount than the lesser amount already paid. The court simply decided that:

"Plaintiff can only recover upon a contract, express or implied * * * . * * * It follows, there being no contract or promise made by the defendant to pay a greater sum than has been paid, and none implied by statute, that the judgment should be affirmed."

Way v. Pacific Lumber and Timber Co., 74 Wash. 332, 333, 334; 133 Pac. 595, 596.

Thus is disclosed basic distinction between the facts considered in the *Way* case and the facts involved in this appeal. There the plaintiff insurance agent sued the defendant insured upon a policy which specified only the lesser rebate premium, being denied recovery because of inability to prove promise to pay the greater legal premium which was not specified by the policy. In contrast, here the Appellant sues the Appellee upon bonds which specified only the greater legal premium and the defendant defends on a prior oral promise by

Appellant's agent of a lesser rebate premium. In this action, for its recovery of the balance due upon its lawful premium, the Appellant has relied upon an express written contract consisting first of signed application and second of executed bonds, all inherent parts of a single transaction.

The brief of Appellee (p. 26) asks "where is this" agreement? The Appellant replies it is in the record, established without dispute by the documents mentioned coupled with the admissions of witnesses testifying in behalf of the Appellee.

In barest outline, the transaction was the delivery of performance and payment bonds to the United States as obligee to secure a job of construction costing over \$6,000,000.00, in behalf of the joint venture composed of three members (Islands Construction Company, Inc., Montin-Benson Corporation and Anderson Construction Co., Inc.) separate identical bonds being individually executed by each member as a principal and all bonds being executed by the Appellant as surety, pursuant to written application therefor earlier signed by all three members with their agreement for payment of premium.

Chronologically developed, the joint venture arranged to bid for the Government contract before the 18th of May, 1955, according to Anderson, the Appellee's president. (R. 308) He and Baldwin, president of Islands Construction Company, Inc., drew an oral promise of a saving of premium based on future rates from Beeson, Appellant's agent, during an interview in

the “early” or the “middle” part of May, 1955. (R. 277, 293, 297, 308) Anderson signed the application for bonds “prior to May 25, 1955” sometime in “the latter part of May”. (R. 105, 106) According to testimony for Appellee, when so signed, the figures (\$47,753.72) specifying the amount of the premium had not yet been inserted in the application. However, the application—being the obligation of the joint venture and all members jointly and severally—conferred upon the Appellant positive authority “to fill up any blanks left” therein. (Original, Ex. 1; copy attached to Complaint as Ex. A; R. 6, 7, 11)

The bid of the joint venture for the construction contract being acceptable to the United States, performance bonds and payment bonds were later prepared on forms prescribed by the Government, which required that each kind of bond be executed individually by each member of the joint venture. The bonds were so executed. (Ex. 2; Ex. 3; Ex. 7; Ex. 10; R. 109, 111, 145, 146, 169) Each performance bond on the reverse side of the single sheet, at the top of the page immediately above the certificate of the corporate officer attesting the due execution thereof, contained the following: “TOTAL AMOUNT OF PREMIUM CHARGED \$47,753.72”. Each payment bond in similar prominent location contained the following: “TOTAL AMOUNT OF PREMIUM CHARGED \$ PREMIUM INCLUDED IN CHARGE FOR PERFORMANCE BOND”.

By the formal agreement of the joint venture, its administrative management was delegated to Islands Construction Company, Inc., except in a very important

matter — “the matter of insurance and bonds” for which Anderson and Baldwin together were personally responsible. (Ex. 9; R. 112, 135, 264, 291)

In consequence, the performance bonds and the payment bonds, having been fully and individually executed in behalf of each member of the joint venture by its president and an attesting corporate officer, were lodged with Baldwin who caused four signed copies of the \$6,000,000.00 construction contract and all bonds to be delivered to the United States Corps of Engineers at Anchorage, Alaska, with a letter of transmittal dated the 13th of June, 1955. (Ex. 8; R. 145, 146, 147, 148, 149) At that time the payment bonds specified the sum of \$47,753.72 as Appellant’s premium. (R. 57, 149)

When the performance and payment bonds were executed by Anderson as president, with the attestation of another corporate officer of Anderson Construction Co., Inc., the Appellee became directly bound to pay Appellant’s premium as specified in those bonds. When four signed copies of the construction contract and of all bonds were delivered by Baldwin acting through Islands Construction Company, Inc., as authorized manager of the joint venture, the Appellee, as a member of the joint venture, became indirectly bound to pay Appellant’s premium as specified in those bonds.

The execution and delivery of the performance and payment bonds specifying exactly the amount of the Appellant’s lawful premium made quite superfluous and wholly immaterial the presence or absence of any premium figure whatsoever in the earlier application

for such bonds. The bonds themselves, being deliberately signed by all obligors and finally delivered to the obligee were alone self-sufficient to constitute an express written agreement as to the amount of premium. This agreement among all parties involved in the bonds operated as a matter of law to supersede any prior understanding for a rebate based on Beeson's oral promise. This agreement is established in the record without dispute. (Pre-Trial Order, Admitted Facts, R. 57)

CONCLUSION

In closing, the Appellant requotes briefly certain provisions of the Washington Insurance Code as follows:

“Sec. .18.18 The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.”

“Sec. .18.19 No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”

“Sec. .30.17 No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof.”

In closing, the Appellant repeats its contention that the Appellee's defense is based solely upon an oral promise invalidated and prohibited by express statute. Hence, an allowance of such defense by disallowance of Appellant's appeal would constitute judicial assistance to a violation of law.

Respectfully submitted,

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APPENDIX

WASHINGTON INSURANCE CODE

(Laws 1947, Chapter 79)

ARTICLE ONE

INITIAL PROVISIONS

SEC. .01.02 Scope of Code: All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.

SEC. .01.04 "Insurance" Defined: Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

SEC. .01.05 "Insurer" Defined: "Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or inter-insurance exchange is an "insurer" as used in this code.

SEC. .01.06 "Insurance Transaction" Defined: "Insurance transaction" includes any:

- (1) Solicitation.
- (2) Negotiations preliminary to execution.
- (3) Execution of an insurance contract.
- (4) Transaction of matters subsequent to execution of the contract and arising out of it.
- (5) Insuring.

SEC. .01.07 "Person" Defined: "Person" means any individual, company, insurer, association, organization, reciprocal or inter-insurance exchange, partnership, business trust, or corporation.

ARTICLE ELEVEN

INSURING POWERS

SEC. .11.01 Kinds of Insurance and Capital Required: 1. Domestic stock insurers may transact kinds of insurance in this state upon qualifying therefor and by having paid-in capital and surplus represented by assets, all as follows:

* * *	Minimum	Minimum
	Capital	Surplus
	Required	Initially
	Required	Required
(6) Surety insurances	\$300,000.00	\$100,000.00
(a) Surety		

SEC. .11.08 Surety Insurance Defined: Surety insurance includes:

(1) Credit insurance as defined in item (9) of section .11.07.

(2) Bail bond insurance as defined in section .11.09.

(3) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust.

(4) Guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship.

(5) Indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidence of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, including any loss while the same are being transported in armored motor ve-

hicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

ARTICLE SEVENTEEN

AGENTS, BROKERS, SOLICITORS, AND ADJUSTERS

SEC. .17.21 Minimum License Combinations: Except as provided in section .17.19, an agent's license shall not be issued unless it includes, and the applicant is qualified for, one (1) or more of the following kinds of insurance:

- (1) Casualty.
- (2) Disability.
- (3) Life.
- (4) Marine and transportation.
- (5) Property.
- (6) Surety.
- (7) Vehicle.

SEC. .17.48 Reporting and Accounting for Premiums: 1. An agent or any other representative of an insurer involved in the procuring or issuance of an insurance contract shall report to the insurer the exact amount of consideration charged as premium for such contract, and such amount shall likewise be shown in the contract and in the records of the agent. Each willful violation of this provision shall constitute a misdemeanor.

ARTICLE EIGHTEEN

THE INSURANCE CONTRACT

SEC. .18.01 Scope of Article: The applicable provi-

sions of this article shall apply to insurances other than ocean marine and foreign trade insurances. This article shall not apply to life or disability insurance policies not issued for delivery in this state nor delivered in this state.

SEC. .18.10 Approval of Forms: 1. No insurance policy form other than surety bond forms, or application form where written application is required and is to be attached to the policy, or printed life or disability rider or endorsement form shall be issued, delivered, or used unless it has been filed with and approved by the Commissioner. This section shall not apply to policies, riders or endorsements of unique character designed for and used with relation to insurance upon a particular subject.

SEC. .18.14 Content of Policies in General: 1. The written instrument, in which a contract of insurance is set forth, is the policy.

2. A policy shall specify:

(1) The names of the parties to the contract. The insurer's name and type of organization shall be clearly shown in the policy.

(2) The subject of the insurance.

(3) The risks insured against.

(4) The time at which the insurance thereunder takes effect and the period during which the insurance is to continue.

(5) A statement of the premium, other than as to surety bonds, and if other than life, disability, or title insurance, the premium rate.

(6) The conditions pertaining to the insurance.

3. If under the contract the exact amount of premiums is determinable only at termination of the con-

tract, a statement of the basis and rates upon which the final premium is to be determined and paid shall be furnished any policy examining bureau having jurisdiction or to the insured upon request.

4. This section shall not apply to surety insurance contracts.

SEC. .18.17 "Premium" Defined: "Premium" as used in this code means all sums charged, received, or deposited as consideration for an insurance contract or the continuance thereof. Any assessment, or any "membership," "policy," "survey," "inspection," "service" or similar fee or charge made by the insurer in consideration for an insurance contract is deemed part of the premium.

SEC. .18.18 Stated Premium Must Include All Charges: 1. The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.

2. No insurer or its officer, employee, agent, solicitor, or other representative shall charge or receive any fee, compensation, or consideration for insurance which is not included in the premium specified in the policy.

3. Each violation of this section is a gross misdemeanor.

SEC. .18.19 Must Contain Entire Contract: No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.

SEC. .18.48 Discrimination Prohibited: No insurer shall make or permit any unfair discrimination in favor of particular individuals or persons, or between insureds or subjects of insurance having substantially like insuring, risk, and exposure factors, or expense elements, in the terms or conditions of any insurance

contract, or in the rate or amount of premium charged therefor, or in the benefits payable or in any other rights or privileges accruing thereunder. This provision shall not prohibit fair discrimination by a life insurer as between individuals having unequal expectations of life.

ARTICLE NINETEEN

RATES

SEC. .19.01 Scope of Article: 1. Except as is otherwise expressly provided the provisions of this article apply to all insurances upon subjects located, resident or to be performed in this state except:

(1) Life insurance;

(2) Disability insurance;

(3) Reinsurance, except as to joint reinsurance as provided in section .19.36;

(4) Insurance against loss of or damage to aircraft, their hulls, accessories, and equipment, or against liability, other than Workmen's Compensation and employers' liability, arising out of the ownership, maintenance or use of aircraft;

(5) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity; and such other risks commonly insured under marine, as distinguished from inland marine, insurance contracts as may be defined by ruling of the Commissioner for the purposes of this provision;

(6) Title insurance.

2. Except, that every insurer shall, as to disability insurances, before using file with the Commissioner its manual of classification, manual of rules and rates, and any modifications thereof.

SEC. .19.02 Rate Standard: Premium rates for in-

insurance shall not be excessive, inadequate, or unfairly discriminatory. This section does not apply to casualty insurance.

SEC. .19.03 Making of Rates: Rates shall be used, subject to the other provisions of this article, only if made in accordance with the following provisions:

(1) In the case of insurances under standard fire policies and that part of marine and transportation insurances not exempted under section .19.01, manual, minimum, class or classification rates, rating schedules or rating plans, shall be made and adopted; except as to specific rates on inland marine risks individually rated, which risks are not reasonably susceptible to manual or schedule rating, and which risks by general custom of the business are not written according to manual rates or rating plans.

(2) In the case of casualty and surety insurances:

(a) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

(b) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(3) Due consideration in making rates for all insurances shall be given to:

(a) Past and prospective loss experience within and outside this state; and in the case of rates for fire insurance, to the loss experience of insurers as to insurance against fire during a period of not less than the most recent five-year period for which such experience is available.

(b) Conflagration and catastrophe hazards, where present.

(c) A reasonable margin for underwriting profit and contingencies.

(d) Dividends, savings and unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers.

(e) All other relevant factors within and outside this state.

(4) In addition to other factors required by this section, rates filed by an insurer on its own behalf may also be related to the insurer's plan of operation and plan of risk classification.

(5) Except to the extent necessary to comply with section .19.02 uniformity among insurers in any matter within the scope of this section is neither required nor prohibited.

SEC. .19.04 Filing Required: 1. Every insurer shall, before using, file with the Commissioner every manual of classifications, manual of rules and rates, and every rating plan as to surety insurances, and every rating schedule, minimum rate, class rate, and rating rule as to other insurances, and every modification of any of the foregoing which it proposes. The insurer need not so file any rate on individually rated risks as described in item (1) of section .19.03; except that any such spe-

cific rate made by a rating organization shall be filed. This section does not apply to casualty insurance.

2. Every such filing shall state its proposed effective date and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the Commissioner does not have sufficient information to determine whether the filing meets the requirements of this article, he may require the insurer to furnish the information upon which it supports the filing. An insurer may offer in support of any filing

(1) the experience or judgment of the insurer or rating organization making the filing,

(2) the experience of other insurers or rating organizations, or

(3) any other factors which the insurer or rating organization deems relevant. A filing and any supporting information shall be open to public inspection only after the filing becomes effective.

3. Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by section .19.09.

SEC. .19.05 Filings by Bureau: 1. If so authorized by an insurer, the Commissioner shall accept, in lieu of filings by the insurer, filings on its behalf made by a rating organization then licensed as provided in this article.

SEC. .19.07 Special Filings: The following special filings, when not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this article until such time as the Commissioner reviews the filing and for so long thereafter as the filing remains in effect:

(1) Special filings with respect to surety or guaranty bonds required by law or by court or executive order or by order, rule or regulation of a public body.

(2) Specific rates on inland marine risks individually rated by a rating organization, which risks are not reasonably susceptible to manual or schedule rating, and which risks by general custom of the business are not written according to manual rates or rating plans.

SEC. .19.17 Application for License: 1. Any person, whether domiciled within or outside this state, except as provided in paragraph two of this section, may make application to the Commissioner for a license as a rating organization for such kinds of insurance or subdivisions thereof, if for casualty or surety insurances, or for such subdivision, class of risks or a part or combination thereof, if for other insurances, as are specified in its application, and shall file therewith:

(1) A copy of its constitution, its articles of agreement or association, or its certificate of incorporation, or trust agreement, and of its by-laws, rules and regulations governing the conduct of its business;

(2) A list of its members and a list of its subscribers;

(3) The name and address of a resident of this state upon whom notices or orders of the Commissioner or process affecting such rating organization may be served, and

(4) A statement of its qualifications as a rating organization.

2. Any rating organization proposing to act as such as to insurance under standard form fire policies, shall be licensed only if all the following conditions are complied with:

(1) The applicant and the operators of such rating

organization shall be domiciled in and shall actually reside in this state.

(2) The ownership of such rating organization shall be vested in trustees for all its subscribers under such trust agreement as is approved by the Commissioner, and the rating organization shall be and shall be conducted as a non-profit public service institution.

(3) Such rating organization shall not be connected with any insurer or insurers except to the extent that any such insurer may be a subscriber to its services.

SEC. .19.28 Deviations: 1. Every subscriber to a rating organization shall adhere to the filings made on its behalf by such organization, and shall not deviate therefrom except as provided in this section.

2. Any such subscriber may make written application to the Commissioner for permission to file a deviation, and shall at the same time send a copy of the application to the rating organization. The application shall specify the deviation desired, and the basis thereof. In the case of deviations as specified in paragraph four of this section, the application shall be accompanied by the data upon which the applicant relies. The Commissioner shall forthwith set a date for a hearing on the application and give notice thereof to the applicant and to the rating organization. If the rating organization informs the Commissioner that it does not desire a hearing he may, upon consent of the applicant, waive the hearing.

3. As to fire insurance under standard form fire policies, any such deviation shall be only by a uniform percentage of addition to or decrease from all rates resulting from all filings relative to such insurance made by the rating organization on behalf of such applicant and then in effect.

In considering the application for permission to file

such deviation the Commissioner shall give consideration to the available statistics and the applicable principles for rate making as provided in section .19.03.

4. As to insurance other than that designated in paragraph three of this section, any such deviation shall be only by a uniform percentage decrease or increase to be applied to the premiums produced by the rating system so filed for a kind of insurance, or for a class of insurance which is found by the Commissioner to be a proper rating unit for the application of such uniform percentage decrease or increase, or for a subdivision of a kind of insurance (1) comprised of a group of manual classifications which is treated as a separate unit for rate making purposes, or (2) for which separate expense provisions are included in the filings of the rating organization.

5. If upon such hearing the Commissioner finds the proposed deviation to be justified, and that premiums and rates resulting therefrom would not be inadequate, excessive, or unfairly discriminatory, he shall issue his order permitting the deviation to be filed and such deviation shall thereupon become effective. If he finds otherwise, he shall issue his order denying the application.

6. Each deviation permitted to be filed shall be effective for a period of not less than one (1) year from the date of such permission unless terminated sooner with the approval of the Commissioner. Every such deviation shall terminate upon a material change of the basic rate from which the deviation is made. The Commissioner shall determine whether a change of the basic rate is so material as to require such termination of deviations.

7. This section does not apply to casualty insurance.

ARTICLE TWENTY-EIGHT

SURETY INSURANCE

SEC. .28.01 Requirements Deemed Met by Surety Insurer: Whenever by law or by rule of any court, public official, or public body, any surety bond, recognizance, obligation, stipulation, or undertaking is required or is permitted to be given, any such bond, recognizance, obligation, stipulation, or undertaking which is otherwise proper and the conditions of which are guaranteed by an authorized surety insurer, or by an unauthorized surety insurer as a surplus line pursuant to article fifteen of this code, shall be approved and accepted and shall be deemed to fulfill all requirements as to number of sureties, residence or status of sureties, and other similar requirements, and no justification by such surety shall be necessary.

SEC. .28.02 Fiduciary Bonds, Expense: Any fiduciary required by law to give bonds, may include as part of his lawful expense to be allowed by the court or official by whom he was appointed, the reasonable amount paid as premium for such bonds to the authorized surety insurer or to the surplus line surety insurer which issued or guaranteed such bonds.

SEC. .28.03 Court Bonds, Costs: In any proceeding the party entitled to recover costs may include therein such reasonable sum as was paid to such surety insurer as premium for any bond or undertaking required therein, and as may be allowed by the court having jurisdiction of such proceeding.

SEC. .28.04 Public Officers' Bonds, Costs: The premium for bonds given by such surety insurers for appointive or elective public officers and for such of their deputies or employees as are required to give bond shall be paid by the state, political subdivision, or public body so served.

SEC. .28.05 Release from Liability: A surety insurer may be released from its liability on the same terms and conditions as are provided by law for the release of individuals as sureties.

ARTICLE THIRTY

UNFAIR PRACTICES AND FRAUDS

SEC. .30.01 Unfair Practices in General: 1. No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair and deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to paragraph two of this section.

2. In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the Commissioner may from time to time by regulations promulgated only after a hearing thereon, define other methods of competition and other acts and practices in the conduct of such business reasonably found by him to be unfair or deceptive.

SEC .30.14 Rebates: 1. Except to the extent provided for in an applicable filing with the Commissioner then in effect, no insurer, general agent, agent, broker, or solicitor shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.

2. Paragraph one of this section shall not apply as

to commissions paid to a licensed agent, general agent, broker, or solicitor for insurance placed on his own property or risks, if the aggregate of such commissions does not exceed five per cent (5%) of the total net commissions received by the agent, general agent, broker, or solicitor during the same twelve-month period.

3. This section shall not apply to the allowance by any marine insurer, or marine insurance agent, general agent, broker, or solicitor, to any insured, in connection with marine insurance, of such discount as is sanctioned by custom among marine insurers as being additional to the agent's or broker's commission.

SEC. .30.17 Receiving Rebate: 1. No insured person shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or any favor, advantage, share in dividends, or other benefits, or any valuable consideration or inducement not specified or provided for in the policy, or any commission on any insurance policy to which he is not lawfully entitled as a licensed agent, broker, or solicitor. The retention by the nominal policyholder in any group life insurance contract of any part of any dividend or reduction of premium thereon contrary to the provisions of section .24.26, shall be deemed the acceptance and receipt of a rebate and shall be punishable as provided by this code.

2. The amount of insurance whereon the insured has so received or accepted any such rebate or any such commission, other than as to life or disability insurances, shall be reduced in the proportion that the amount or value of the rebate or commission bears to the premium for such insurance. In addition to such reduction of insurance, if any, any such insured shall be liable to a fine of not more than two hundred dollars (\$200).

WASHINGTON INSURANCE CODE

(Laws 1911, Chapter 49)

[Section 33 as below quoted is identical with Section 7077 of Remington's Compiled Statutes cited by the Supreme Court of the State of Washington in *American Surety Company v. Lind*, 132 Wash. 326, 330, 232 Pac. 280, 282.]

ARTICLE ONE

GENERAL PROVISIONS

SEC. 33. Rebates Prohibited.

No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for insurance, on any risk in this state now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, agent, solicitor, or broker, personally or otherwise, offer, promise, give, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever as inducement to insurance or in connection therewith which is not specified in the policy. The license of any insurance company, agent, solicitor, or broker who violates the provisions of this section shall be revoked and no license shall be issued to such company, agent, solicitor, or broker within one year from the date of the revocation of the license.

No insured person or party shall receive or accept, directly or indirectly, any rebate of premium or part thereof, or agent's, solicitor's, or broker's commission thereon payable on the policy, or on any policy of insurance, or any favor or advantage or share in the dividend or other benefits to accrue thereon, or any valuable consideration or inducement, not specified in the policy contract of insurance; the amount of the insurance whereon the insured has received or accepted, either directly or indirectly, any rebate of the premium or agent's, solicitor's, or broker's commission thereon, shall be reduced in such proportion as the amount or value of such rebate, commission, dividend, or other consideration so received by the insured, bears to the total premium on such policy, and any such insured shall be liable, in addition to having the insurance reduced, to a fine of not more than two hundred dollars. No person shall be excused from testifying, or from producing any books, papers, contracts, agreements, or documents at the trial of any person charged with violating any provision of this act, on the ground that such testimony or evidence may tend to incriminate himself, but no person shall be prosecuted for any act concerning which he shall be compelled so to testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying. Rebates affecting life insurance shall be governed by section one hundred eighty of this act.



**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES FIDELITY & GUARANTY COMPANY,
a corporation, *Appellant*,

vs.

ANDERSON CONSTRUCTION CO., INC., a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S PETITION FOR RE-HEARING

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THE ARGUS PRESS, SEATTLE

FILED

JUL 16 1958

PAUL P. O'BRIEN, CLERK

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United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation, *Appellant,*

vs.

ANDERSON CONSTRUCTION CO., INC., a cor-
poration, *Appellee.*

} No. 15681

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S PETITION FOR RE-HEARING

By this petition the appellant respectfully seeks an order of this court granting rehearing en banc on this appeal for the following reasons:

I.

Because By Its Adverse Ruling in its Opinion Filed June, 16, 1958, This Court Disregarded an Elemental Established Principle of Law, To-Wit: That a Prior Oral Agreement is Superseded by a Subsequent Written Contract Between the Same Parties.

This principle is obviously and directly applicable to the appellant's right of recovery against the appellee in this case. To invoke and to enforce this principle does not require reliance upon any essential fact which is presently in dispute on the record.

What are the essential unquestioned facts?

The appellee signed the appellant's formal application for the performance bonds and the payment bonds.

The jury found that when so signed the amount of premium was unspecified therein, and that the appellant's agent in May 1955 orally agreed to allow a reduction below the legal premium by calculating the amount at a rate officially unfiled and unapproved. Later the appellant using forms prescribed by the Government prepared three performance bonds and three payment bonds, each for individual execution by the three members of the appellee's joint venture. After execution by the appellant as surety and subsequent execution by the joint venturers (including the appellee) as principals, all of such bonds were delivered during June 1955 by the authorized corporate manager of the joint venture with four signed copies of its \$6,000,000.00 construction contract in a letter to the United States Corps of Engineers which accepted the same with notification to proceed on the job. As required by the short and simple Government forms, which prohibited any deviation, all such bonds declared the exact amount of premium therefor in separate distinct paragraph—the performance bonds stating: "TOTAL AMOUNT OF PREMIUM CHARGED \$47,753.72"; and the payment bonds stating: "TOTAL AMOUNT OF PREMIUM CHARGED \$ PREMIUM INCLUDED IN CHARGE FOR PERFORMANCE BOND." These statements appeared plainly at the top of the single sheet instruments on the reverse side above certifications of due execution by an officer of each principal with its corporate seal. To repeat, the appellee executed one of these performance bonds and one of these payment bonds—patently for the purpose of making the same effective to conclude the construction contract.

On the facts now uncontroverted in the record, it is clear that the appellant as surety and the appellee with the other joint venturers as principals entered together into a written contract between themselves and with the United States as obligee whereby the premium fixed was the legal premium in the sum of \$47,753.72. On these facts it is equally clear that as a matter of law this subsequent written contract superseded the prior oral agreement for an illegal reduced premium.

In this case the record reflects no issue of fact for the jury based on any attempt of the appellee to avoid its definite undertaking as to premium embodied in the bonds, except only the testimony in which its president stated that he personally signed nothing "on the back of those instruments" (R. 116) and that he did not "remember" whether the amount of premium was specified thereon (R. 120). On the record without doubt the bonds did specify the premium in the sum of \$47,-753.72 (Pre-trial Order, Admitted Facts, R. 57); such is the testimony of the manager of the joint venture who signed two of the bonds, assembled all of them, and caused them finally to be delivered (R. 149-152).

But the bonds being admittedly executed deliberately and duly by the appellee for the purpose intended, their legal effect as a contract obligation cannot be escaped by the appellee merely because its president who placed his signature on the face of the instruments could not "remember" whether the premium figure appeared on the back of those same instruments above the certifying signature of another corporate officer acting for the appellee. Such certainly is the applicable law, as summar-

ized generally by the textbooks, as recognized particularly by this court and as declared positively by the Supreme Court of the State of Washington.

“One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.”

Restatement of the Law of Contracts, Vol. 1,
§ 70, page 73.

“In the absence of a valid excuse one is under a duty to read a contract before signing it, and although he fails to do so will nevertheless be bound by the terms of his written contract; nor may he avoid responsibility by the claim that he did not comprehend the plain meaning of the terms employed.

“As a general rule a person cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form, and this doctrine has been affirmed by numerous courts quoting and citing *Corpus Juris* with approval on such well settled rule. In that connection it has been said that one is under a duty to learn the contents of a written contract before he signs it, and that if, without being the victim of fraud, he fails to read the contract or otherwise to learn its contents, he signs the same at his peril, and is estopped to deny his obligation, will be conclusively presumed to know the contents of the contract, and must suffer the consequences of his own negligence.”

Corpus Juris Secundum Vol. 17, § 137, pp. 487, 490.

“Although apart from statute a signature is not necessary to the formation of a contract, it may serve as a manifestation of an intent to make a contract. A signature with a lead pencil is sufficient. A party is bound by a written contract even though his signature does not appear at its end. If his name, written by himself, appears in any part of the agreement, it may be taken as his signature, if it was written for the purpose of giving authenticity to the instrument and thus operating as a signature. Therefore, words written on the back of a contract blank as a portion of the instrument to be signed by the parties become part of the obligation, although the signatures are not below them, but on the preceding page.”

American Jurisprudence, Vol. 12, § 61, pp. 551, 552.

“Ordinarily, delivery and acceptance are considered together by the courts to be the last steps essential to complete a binding contract of insurance. Thus it has been held that acceptance by the insured is as essential as is acceptance by the insurer. And, once such acceptance has been given, it binds, not only the insurer, but the insured as well for all purposes.”

Insurance Law by Appleman, Vol. 1, § 171, p. 172.

“The insured is under a positive duty to read the contract delivered to him, and he will be presumed to have done so. By acceptance and retention, therefore, without objection to the terms thereof, the insured is precluded from stating that he did not

know the terms thereof or did not intend to accept the contract in that form. *Mere retention of the contract over a long period of time is sufficient to preclude the insured thereafter from contending that the contract was not accepted*, and that he should not, therefore, be bound by representations contained therein, provisions as to payments, or *as to premium obligations.*”

Insurance Law by Appleman, Vol. 1, § 173 pp. 174, 175.

“However, when the insured accepts a policy, he accepts all of its stipulations, provided they are legal and not contrary to public policy. Where changes from the application appear in the delivered contract under a more stringent doctrine, the insured has a duty to examine it promptly and notify the company immediately of his refusal to accept it. If such policy is accepted or is retained an unreasonable length of time, the insured is presumed to have ratified any changes therein and to have agreed to all its terms.

“An acceptance and retention without objection is an acceptance of all terms and conditions contained in the policy, and an estoppel arises to prevent the insured from asserting that the policy is not the contract of the parties. The limitations and terms of the policy are held conclusive upon the insured, though he did not understand them, and his acceptance of a policy containing certain warranties may be equivalent to warranting the truth of such matters. Nor is it any excuse that the insured had neglected to read the policy or to familiarize himself with its terms.”

Insurance Law by Appleman, Vol. 12, § 7155, pp. 220, 221.

Almost one hundred years ago, the Supreme Court of the United States ruled:

“That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract and, when called upon to respond to obligations, to say that he did not read it when he signed it, or did now know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.”

Upton v. Tribilcock, 91 U.S. 45, 23 L.Ed. 202, 205.

In a case originating in the State of Washington, this court said:

“It is a fundamental rule that a person in possession of all his faculties, who signs an instrument for the purpose of giving effect thereto, cannot evade the consequences of the document by merely neglecting to read it. *Upton v. Tribilcock*, 91 U.S. 45, 50, 23 L.Ed. 203.”

Ford Motor Co. v. Pearson, 40 F.(2d) 858, 867 (1930 CCA9).

In a later case, quoting from a number of decisions by the Supreme Court of the State of Washington, this court recognized the law in that jurisdiction by an opinion saying:

“The law of Washington is well settled to the effect that one who will not use the opportunities open to him to determine what his contract is, and if such opportunities would propably have revealed

the defect, he cannot have reformation for mistake. In *Johnson v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 P. 810, 812, the court said: 'We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.' And again in the same case: 'The means of knowledge are equivalent to knowledge. A clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to a discovery.'

"This doctrine was reaffirmed in the case of *Kelley v. Von Herberg*, 184 Wash. 165, 50 P.(2d) 23 where the court quoted the same language as used in the *Johnson* case, *supra*, with approval. Following this rule as established by the Washington court, the plaintiffs cannot claim ignorance of the coverage in the policy. Myhre intrusted the matter of writing the insurance to Langer, who wanted it for the protection of his Bank. Myhre gave Langer no instructions except as to the amounts of \$2,500. and \$1,500. Myhre's obligation to read the policy was the more imperative because of this. Certainly the insured has some duties as well as the insurer. The insured owes the obligation to examine his policy and to inform the insurance company wherein it is not as he intended it. Nor is this a case where the insured had to resort to the fine print on the policy to tell whom and what it covered. The fact that it covered a dwelling house was as apparent from a mere glance at the face of the policy as was the identity of the insured. To read at all the description and conditions of coverage in the inside of the policy would have disclosed

that the property was covered *only* while used for dwelling house purposes. Further, common and ordinary prudence should have suggested to Myhre, when he found that Langer had left him out of the policy, to pursue his investigation so as to determine whether he was properly protected in other respects; yet he asked Langer to correct the policy only by putting his name on it. He was content to take chances on the rest of the policy. According to Myhre's testimony, the policy was a matter of extreme unimportance to him. He did not seek it. He paid for it apparently only because the bank required a policy. While it is possible to suppose that Myhre did see the description on the policy, though he said that he did not, it is still the duty of the insured to read his policy so as to ascertain the contents and if the policy is unsatisfactory, to object thereto at that time and not wait for the loss long afterward and then claim a right of reformation. The Washington case of *Hayes v. Automobile Ins. Exchange*, 126 Wash. 487, 218 P. 252, 253, states with reference to an insurance policy containing false statements which were claimed not to have been read: 'Whether he read it or not is immaterial. It was his duty to read it, and the law says that he did read it.' When the same case came before the court en banc for a rehearing, 129 Wash. 202, 224 P. 594, 595, the court said: 'Whether he read the policy or not is immaterial, for the law charges him with the duty of reading it.' These statements are reaffirmed in *Perry v. Continental Insurance Co.*, 178 Wash. 24, 33 P.2d 661 and *McCann v. Reeder*, 178 Wash. 126, 34 P.2d 461. To say in the instant case that had he read the insurance policy, the insured would not have been apprized of the mistakes claimed, if mistakes they were, is inconceiv-

able. The Court of Washington further expressed itself in the case of *Carew, Shaw & Bernasconi v. General Casualty Co.*, 189 Wash. 329, 65 P.2d 689, 694, disposing of this exact problem by stating: 'Even if we did not agree with the trial court that the policy truly reflects the quotation made to Shaw, the negligence of appellant would defeat its action for reformation. Appellant is presumed and is required to know the provisions of the insurance contract, as it would any other written contract into which it enters. It will not do for appellant's vice president to say that he did not read the policy. Whether he or any of the other officers or agents of appellant read the policy is immaterial. It was appellant's duty to read the policy, and the law says that that was done. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 P. 955; *Hayes v. Automobile Ins. Exchange*, 126 Wash. 487, 218 P. 252; *Perry v. Continental Insurance Co.*, 178 Wash. 24, 33 P. (2d) 661; *McCann v. Reeder*, 178 Wash. 126, 34 P.(2d) 461; *Kelley v. Von Herberg*, 184 Wash. 165, 50 P.(2d) 23.' "

Fidelity & Guaranty Fire Corp. v. Bilquist,
108 F.(2d) 713, 717 (1940 CCA9).

In a still later case with respect to the law applicable in the State of Washington, this court said:

"A reading of the policy would have disclosed the limiting provision, with the word 'Washington' capitalized and placed therein, and we can hardly agree with appellants that the trial court erred in refusing to hold that the limitation was inserted through inadvertance and contrary to the agreement of all concerned. The later actions of the parties suggest, at the most, a conflict in the evidence which is insufficient for purposes of reforma-

tion. The fact that appellant, Van Meter, did not see the policy prior to the loss does not aid him. The policy was held by the finance companies, but this did not negative his right to inspect it; secondly, these companies held their rights to the policy through Van Meter and at his instance. The fact that all failed to notice a provision, which could readily be seen, and take exception thereto does not prevent the operation of the provision."

Van Meter v. Franklin Fire Ins. Co., 164 F. (2d) 325, 327 (1947-CCA9).

Since these recognitions by this court of the law applicable in the State of Washington, its Supreme Court in 1953 adhered to its own earlier decisions by saying:

"Appellant had ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons. Under these circumstances, he cannot be heard to deny that he executed the contract, and he is bound by it. 12 Am. Jur. 628, § 137; 1 Williston on Contracts (Rev. ed) 89, § 35; *Perry v. Continental Ins. Co.* 178 Wash. 24, 33 P.(2d) 661; and *Terminal Trading Co. v. Babbit*, 7 Wn.(2d) 166, 109 P.(2d) 564,"

Lake Air, Inc. v. Duffly, 42 Wn.(2d) 478, 480.

In rejecting the appellant's contention based upon the execution of the performance and payment bonds by the appellee and by its joint venture, the opinion of this court said: "There is no evidence that Anderson knew of or intended to be bound by a statement by Guaranty to the United States of the premium charged for the bond, which was made on the back of the formal instrument." The essence of this comment in the opinion is a postulate of law opposed to and repudiated by the nu-

merous authorities above quoted, including this court's own precedents as to the law of the State of Washington.

Again, in rejecting the appellant's contention based upon the execution and delivery of the performance and payment bonds by the appellee and its joint venture, and after observing that the verdict necessarily implied a jury finding of an oral agreement for a reduced premium, the opinion of this court said that: "Therefore, there *could* have been no express contract in writing between the parties." This remark in the opinion could and would be correct if an issue of fact before the jury were whether (in the alternative) an oral or a written contract had been made; or if an issue of fact before the jury were whether the bonds had been executed and delivered by the appellee and its joint venture. There were no such issues. The appellee by its answer alleged and by its testimony satisfied the jury that an *earlier* oral agreement had been made. The appellant, by the pleadings, the admissions in the pre-trial order, and all of the evidence, established without controversy that a *subsequent* written contract had been made.

In consequence as a mere and clear matter of law the lower court should have instructed the jury to return a verdict for the appellant as requested, or should have granted the appellant's motion for judgment notwithstanding the verdict or appellant's motion for a new trial. In further consequence as a mere and clear matter of law this court should have reversed the lower court.

II.

Because by Its Adverse Ruling in Its Opinion Filed June 16, 1958, This Court So Misconstrued the Insurance Code of the State of Washington in Its Awkward Application to Guaranty Insurance as to Call for a Rehearing, En Banc, Considering Its Enfeebling Influence Upon Wholesome Statutory Regulation of the Nation-wide Surety Business.

Solely for the sake of present brevity but in the prospect of future opportunity, the appellant refrains here from reargument related to the Washington Insurance Code, now relying upon its briefs in this appeal which this court is invited to review.

However, while readily appreciating that the rulings of appellate courts in other states do not govern this court in giving judicial expression to the law of Washington, some of the decisions (previously uncited) in other jurisdictions, interpreting comparable statutes which hold void agreements to deviate from legal insurance premiums, should be read by this court with persuasive respect before adhering to its own unfortunate contrary opinion.

Sunshine Bus Lines v. American Fidelity and Casualty Co., 75 F.(2d) 427 (CCA 5 (Texas) 1935);

American Mutual Liability Ins. Co. v. Plywoods-Plastics Corp., 81 F. Supp. 157 (DC SC, 1948);

Walker v. Bituminous Casualty Corp., 74 Ga. 517, 40 S.E.(2d) 228 (Ga., 1946);

Century Cab Inc., et al., v. Commissioner of Insurance, et al., 327 Mass. 652, 100 N.E. (2d) 481 (Mass., 1951);

Employers' Liability Assurance Corp. v. Arthur Morgan Trucking Co., 236 Mo. App. 445, 156 S.W.(2d) 8 (Mo., 1941) ;

Stephen Peabody Jr. & Co. v. Travelers' Ins. Co., 240 N.Y. 511, 148 N.E. 661 (N.Y., 1925) ;

Employers' Liability Assurance Corp. v. Success-Uncle Sam Cone Co., Inc., 208 N.Y.S. 510 (N.Y., 1925) ;

Ocean Accident & Guarantee Corp. v. Albina Marine Iron Works, 122 Ore. 615, 260 Pac. 229 (Ore., 1927) ;

Manufacturers Casualty Ins. Co. v. Daison Mfg Co., Inc., 16 Pa. D. & C. 803 (Penn. 1932) ;

Glen H. McCarthy Co. v. Knox, 196 S.W.(2d) 832 (Texas, 1945) ;

Associated Employers Lloyds v. Dillingham, 262 S.W.(2d) 544 (Texas, 1953).

In the *American Mutual Liability Ins. Co.* case, *supra*, the court stated:

“Courts of other jurisdictions have held consistently that when insurance rates are fixed by a state agency, contracts providing for different rates are unenforcible. *Great American Indemnity Co. v. Abbott Glass Co.*, 149 Misc. 437, 267 N.Y.S. 523; *Peabody, Jr., & Co. v. Travelers Ins. Co.*, 240 N.Y. 511, 148 N.E. 661, 42 A.L.R. 1090; *Employers Liability Corp. v. Success-Uncle Sam Cone Co.*, 124 Misc. 614, 208 N.Y.S. 510. The rule is analogous to that which makes rates for common carriers set by State or Federal agencies inviolable and not subject to change by the carrier and the shipper regardless of the equities existing between them. *White v. Southern Ry. Co.*, 208 S.C. 319, 38 S.E.

(2d) 111, 165 A.L.R. 988; *Central R. R. Co. of New Jersey v. Mauser*, 241 Pa. 603, 88 A. 791, 49 L.R.A., N.S., 92.” (Emphasis added).

American Mut. Liability Ins. Co. v. Plywoods-Plastics Corp., 81 F. Supp. 157 (DC SC 1948).

In the case of *Associated Employers Lloyds v. Dillingham*, *supra*, the applicable rule of law was stated as follows:

“The establishment of premium rates is vested exclusively in the Commission and the rates promulgated by the Commission are not subject to alteration by agreement, waiver, estoppel, or any other device. As a matter of law, the insurance carrier agrees to collect, and the subscriber agrees to pay, the rate prescribed by the Commission. That rate is part of every contract, regardless of any understanding by the parties. The insurance carrier cannot charge more, or bind itself to take less, than the prescribed lawful rate of premium. *A contract to rebate, directly or indirectly, any part of the prescribed premium is illegal and void, and cannot be a defense in a suit for the full premium. Where a rate is prescribed by one of the state’s regulatory bodies, it is the only rate the parties can contract for.*”

Associated Employer’s Lloyds v. Dillingham, 262 S.W.(2d) 544 (Texas 1953) (Emphasis added).

In the case of *Stephen Peabody Jr. & Co. v. Travelers’ Ins. Co.*, *supra*, the Court of Appeals of New York stated:

“The gist of the complaint is that the defendant contracted with the plaintiff and the New York

Dock Company that its premium rates would not exceed a certain fixed and definite amount, notwithstanding any subsequent revision of rates by the compensation inspection rating board of the state of New York.

* * *

“As the Insurance Law recognizes the rating association, it is to be presumed that the rates and schedules fixed by such an association within the state of New York were properly adjusted to the risks, and met with the approval of the superintendent of insurance who was given supervision over them. *A contract to disregard an increase in such rates or basis rate, and to ignore the disapproval of the rating association, and therefore of the superintendent of insurance was against public policy and void.*”

Stephen Peabody Jr. & Co. v. Travelers' Ins. Co., 240 N.Y. 511, 148 N.E. 661 (N.Y., 1925)
(Emphasis added).

This court can judicially note that probably all states have felt the necessity of legislation regulating all kinds of insurance which has become an inherent part of almost all business in this country. The appellant feels confident that this court, sitting en banc, will reach a conclusion which will tend to discourage whispered deals and cut-throat competition.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 23 of this court, I, LANE SUMMERS, hereby certify that I have prepared and signed the foregoing petition in behalf of the appellant, that in my judgment it is well founded, and that it is not interposed for delay.

LANE SUMMERS







